(1)

SHDKT PROCEEDINGS AND ORDERS DATE: [06/11/96]

CASE NBR: [95108836] CFH STATUS: [GRANTED]
SHORT TITLE: [Felker, Ellis W.]
VERSUS [Turpin, Warden] DATE DOCKETED: [050296]
*** CAPITAL CASE *** PAGE: [01]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	May 2 1996	G	Application (A95-890) for a stay of execution of sentence of death, submitted to Justice Kennedy.
2	May 2 1996	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due June 1, 1996)
4	May 2 1996		(A95-890) Temporary stay granted by Justice Kennedy.
7	May 2 1996		Application (A95-890) referred to the Court by Justice Kennedy.
9	May 2 1996		Response to application (A95-890) filed by Turpin, Warden.
6	May 3 1996		Petition GRANTED. The application for stay of execution of sentence of death presented to Justice Kennedy and by him referred to the Court is granted. The motion for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted. The

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*** CAPITAL CASE *** PAGE: [02]

	DATE	NOTE	PROCEEDINGS & ORDERS
6	May 3 1996		Petition GRANTED. The application for stay of execution of sentence of death presented to Justice Kennedy and by him referred to the Court is granted. The motion for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted. The parties shall submit briefs limited to the following questions: (1) Whether Title I of the Anti-Terrorism and Effective Death Penalty Act of 1966 (the Act), and in particular Section 106(b)(3)(E), 28 U.S.C. Section 2244(b)(3)(E), is an unconstitutional restriction of the jurisdiction of this Court. (2) Whether and to what extent the provisions of Title I of the Act apply to petitions for habeas corpus filed as original matters in this Court pursuant to 28 U.S.C. Section 2241. (3) Whether application of the Act in this case is a

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*** CAPITAL CASE *** PAGE: [03]

	DATE	NOTE	PROCEEDINGS & ORDERS
			suspension of the writ of habeas corpus in violation of Art. I, Section 9, clause 2 of the Constitution. The parties' briefs are to be filed with the Clerk of this Court and served upon opposing counsel on or before 2

3PP

p.m., Friday, May 17, 1996. Reply briefs, if any, may be filed with the Clerk of this Court and served upon opposing counsel on or before 2 p.m., Tuesday, May 28, 1996. The Solicitor General is invited to file a brief expressing the views of the United States. Briefs may be submitted in compliance with Rule 33.2 to be replaced as soon as possible with briefs prepared under Rule 33.1. Rule 29.2 does not apply. Oral argument is set for Monday, June 3, 1996, at 10 a.m. Dissenting opinion by Justice Stevens, with whom Justice Souter, Justice Ginsburg and Justice Breyer join.

	DATE	NOTE	PROCEEDINGS & ORDERS
8	May 3 1996		Application (A95-890) granted by the Court.
26	May 3 1996		SET FOR ARGUMENT MONDAY, JUNE 3, 1996. (1ST CASE).
10	May 14 1996	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
11	May 16 1996	P	Application (A95-929) of the Solicitor General for leave to file an amicus curiae brief in excess of the page limitation, submitted to Justice Kennedy.
24	May 16 1996		(A95-929) Application granted by Justice Kennedy, allowing a maximum of 50 pages.
13	May 17 1996	X	Brief of petitioner Ellis Wayne Felker filed.
14	May 17 1996	X	Brief of respondent Tony Turpin, Warden filed.
15	May 17 1996	X	Brief amicus curiae of United States filed.
16	May 17 1996	X	Brief amicus curiae of American Civil Liberties Union, et al. filed.

	DATE	NOTE	PROCEEDINCS & ORDERS
17	May 17 1996	X	Brief amici curiae of Criminal Justice Legal Foundation, et al. filed.
18	May 17 1996	X	Brief amici curiae of Alabama, et al. filed.
19	May 17 1996	X	Brief amici curiae of Washington Legal Foundation, et al. filed.
20	May 17 1996	X	Brief amici curiae of Orrin G. Hatch, et al. filed.
21	May 17 1996	X	Brief amicus curiae of National District Attorneys Association filed.
23	May 24 1996		CIRCULATED.
28	May 24 1996		Record filed.
		*	Record proceedings United States Court of Appeals for the Eleventh Circuit.
22	May 28 1996		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

Last page of docket

	DATE	NOTE	PROCEEDINGS & ORDERS
25	May 28 1996	X	Reply brief of respondent (TBP) filed.
27	May 30 1996		Joint appendix filed.
29	Jun 3 1996		ARGUED.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

FILE COPY

No. 95-8836 (A-890)

In re ELLIS WAYNE FELKER

PETITION FOR WRIT OF HABEAS CORPUS, FOR APPELLATE OR CERTIORARI REVIEW OF THE DECISION OF THE UNITED STATES CIRCUIT COURT FOR THE ELEVENTH CIRCUIT, AND FOR STAY OF EXECUTION

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QUESTIONS PRESENTED

Petitioner, a death-sentenced inmate in the custody of Respondent, presents the following questions:

1. Did the State of Georgia obtain Petitioner's conviction and death sentence in violation of his federal constitutional rights?

2. Does the one week old Antiterrorism and Effective Death Penalty Act of 1996 ("The Act"):

a. unconstitutionally tie the hands of the federal courts with respect to the exercise of jurisdiction in habeas corpus actions, violating the requirement of separation of powers and encroaching on Article III powers of federal judges?

b. violate the Petitioner's Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights, and the Supremacy Clause, in that it allows state courts to decide federal constitutional issues in a manner that is inconsistent with federal law, with impunity?

c. introduce uncorrectable arbitrariness into the federal habeas corpus process, in violation of the federal constitution?

2. What is a prima facie showing within the context of Sec. 106(b)(3)(C) of the Act?

3. What constitutes "previously unavailable" within the context of Sec. 106(b)(2)(A) of the Act?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No. _____

In re ELLIS WAYNE FELKER

PETITION FOR WRIT OF HABEAS CORPUS, FOR APPELLATE OR CERTIORARI REVIEW OF THE DECISION OF THE UNITED STATES CIRCUIT COURT FOR THE ELEVENTH CIRCUIT, AND FOR STAY OF EXECUTION

The Petitioner, Ellis Wayne Felker, respectfully requests that this Court enter a stay of execution so as to consider and grant Petitioner's petition for a writ of habeas corpus and to conduct appellate review of the lower court's actions.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is not reported. A copy of the opinion is attached hereto.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 2241 and 2254(a), and 28 U.S.C. Section 1651(a).

STATEMENT OF REASONS FOR NOT MAKING APPLICATION TO THE DISTRICT COURT

As required by Rule 20 (4), Petitioner states that he has not applied to the district court because the circuit court prohibited such an application. The Petitioner exhausted his state court remedies when the Georgia Supreme Court denied relief on May 2, 1996. Petitioner has complied with 28 U.S.C. §

2254(b), as now amended by the Act, to the extent he has had notice of those requirements and to the extent they are capable of being met. Exceptional circumstances warrant the exercise of this Court's jurisdiction and adequate relief cannot be obtained in any other form or from any other court.

STATEMENT OF THE CASE

A. Statement of the Facts

1. On February 5, 1983, Petitioner was convicted of the murder of Evelyn Joy Ludlum. The primary controversy at trial was when the victim died. The day after the victim's disappearance, police placed Petitioner under constant surveillance, meaning he thereafter had the best alibi known.

2. The victim's body was discovered on December 8, 1981, thirteen days after her disappearance. A state crime lab employee who was not a physician conducted an autopsy. Georgia is the only jurisdiction in the Western World that allows a non-physician to conduct an autopsy. This state agent told his colleagues that the victim had been dead for three days when found. When this made Petitioner innocent--he had a state provided alibi for more than a week before this time of death--this agent changed his opinion.

3. The agent was allowed to testify at trial that the time of death could have been two weeks before the body was found, making Petitioner potentially guilty. A medical doctor testified on behalf of Petitioner that the agent's original opinion was

correct--the victim had been dead three to five days when found--making Petitioner innocent.

4. Thus, the jury was left to determine whether the state, through its non-physician state agent, had proven guilt beyond a reasonable doubt. The jurors' task was made unconstitutionally easy by a jury instruction and voir dire statements which equated the absence of reasonable doubt with the presence of moral certainty of guilt. The jury convicted Petitioner and sentenced him to death. This Court has recognized that such instructions violate bedrock constitutional principles.

5. Petitioner sought in the circuit court the retroactive correction of this error. He also challenged the constitutionality of the Act as written and as applied, raised the claim that he was innocent and that his execution would be unconstitutional, and raised the claim that the manner in which he was tried and convicted, i.e., state agent, non-physician, testimony regarding autopsy findings and time of death, violated the constitution. Relief was denied.

B. Procedural History

1. The name and location of the court which entered the judgment of conviction and sentence under attack are:

Superior Court of Houston County
Perry, Georgia

2. The date of the judgment of conviction was February 5, 1983.

3. The date of the judgment of sentence was February 7, 1983. The sentence was that Petitioner be put to death by electrocution for the crime of murder.

4. The nature of the offenses involved is that Petitioner was convicted of murder, in violation of O.C.G.A. § 16-5-1, rape, in violation of O.C.G.A. § 16-6-1, aggravated sodomy, in violation of O.C.G.A. § 16-6-2, and false imprisonment, in violation of O.C.G.A. § 16-5-41.

5. At his trial, Petitioner pled not guilty.

6. The trial on the issue of guilt or innocence and on the issue of sentence was had before a jury.

7. Petitioner testified at the trial on the issue of guilt or innocence. He did not testify at the sentencing trial.

8. Petitioner appealed his conviction and sentence of death.

9. The facts of Petitioner's appeal are as follows:

(a) The Supreme Court of Georgia affirmed Petitioner's conviction and sentence of death on March 15, 1984. Felker v. State, 252 Ga. 351, 314 S.E.2d 621 (1984). A timely filed Motion for Reconsideration was denied on March 29, 1984.

(b) Petitioner thereafter filed a Petition for Writ of Certiorari in the United States Supreme Court. The United States Supreme Court denied the Petition for Writ of Certiorari on October 1, 1984. Felker v. Georgia, 469 U.S. 873, 105 S.Ct. 229 (1984). Rehearing was denied November 26, 1984.

(c) Petitioner filed a Petition for Writ of Habeas Corpus in the Superior Court of Butts County on December 17, 1984. The Petition was denied August 6, 1990. A timely filed Certificate of Probable Cause to Appeal was denied by the Georgia Supreme Court on September 3, 1991.

(d) Petitioner filed a Petition for Writ of Certiorari in the United States Supreme Court, which was denied on January 21, 1992. Felker v. Zant, 502 U.S. 1064, 112 S.Ct. 950 (1992).

10. A federal petition for habeas corpus relief was filed in the district court on April 28, 1993. The district court would not allow Petitioner to proceed in forma pauperis. On June 2, 1993, a filing fee was paid and the district court moved the petition from the miscellaneous docket to the civil docket. On January 26, 1994, the Court denied relief.

11. On May 8, 1995, the United States Court of Appeals for the Eleventh Circuit affirmed the denial of relief by the District Court. Felker v. Thomas, 52 F.3d 907 (1995). Petitioner's timely filed Petition for Rehearing and Suggestion for Rehearing En Banc was denied on August 9, 1995. Felker v. Thomas, 62 F.3d 342 (1995).

12. Petitioner filed a Petition for Writ of Certiorari in the United States Supreme Court. The Petition was denied on February 20, 1996. Felker v. Thomas, __ U.S. ___ 116 S.Ct. 956 (1996). A Motion for Reconsideration in the United States Supreme Court was denied April 15, 1996.

13. On April 30, 1996, Petitioner filed a petition for writ of habeas corpus in the Superior Court of Butts County, Georgia.

REASONS FOR GRANTING THE WRIT

I.

THE ANTITERROISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 ("THE ACT") IS UNCONSTITUTIONAL AS WRITTEN AND APPLIED TO PETITIONER, AND ITS CONSTITUTIONALITY IS AN ISSUE WHICH THIS COURT, RATHER THAN THE LOWER COURT, OUGHT TO RESOLVE.

The Applicant is a death-sentenced inmate in the custody of Respondent. His execution is scheduled for May 2, 1996, at 7:00 p.m. The Applicant has filed a previous federal habeas corpus action, but relief was denied.

The Act contains provisions for the initial screening and then final disposition of potentially second or subsequent habeas corpus petitions. Section 106 of the Act requires a Petitioner to seek the permission of a three judge panel of the circuit court to file a second or subsequent habeas corpus petition in the district court. See Sec. 106(b)(3)(A), (B) and (C). The motion seeking leave to file the petition shall be granted if "the application makes a prima facie showing that the application satisfies the requirements of this section [Sec. 106]." See Sec. 106(b)(3)(C).

Petitioner sought leave to file in the district court a petition which, as permitted by § 106, contained a claim which "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Sec. 106(b)(2)(A). The circuit court

denied permission for the filing of a petition. This action by the lower court was erroneous under the Act. See Argument II, infra.

As a threshold matter, however, this Act raises myriad constitutional concerns and is seriously constitutionally flawed. The Act's attempted removal of circuit rehearing, en banc rehearing, and certiorari review of claims of state violations of federal constitutional rights is unprecedented, dangerous, and invites anarchy in the processing of claims.[1] The Act's order that federal courts must hear certain claims and must rule on them in certain ways more than blurs the distinction between the legislative and judicial branches of the federal government. The Act's requirement that federal courts bow to state courts' incorrect applications of federal constitutional law impacts the Supremacy Clause, and other federal constitutional provisions--total control of the application of the federal constitution to the states is handed over to the states, the very entities that, in this context, are to be controlled by federal courts via the Great Writ. Thus, the Act violates the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments, the Supremacy Clause, and Article III, in that it allows state courts to decide federal constitutional issues in a manner that is inconsistent with federal law, with impunity.

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1. The circuit-wide, and intra-circuit, decisions on whether someone is innocent enough to not be executed, for example, will be ad hoc. The Act thereby introduces ostensibly uncorrectable arbitrariness into the federal habeas corpus process, in violation of the federal constitution.

These infirmities arise in at least the following ways:[2]

a. The Act prohibits the filing of a petition for rehearing and a petition for certiorari if a panel determines that a second or subsequent petition cannot be filed. Thus, what a three judge panel holds in denying permission to file a second or subsequent petition can be completely inconsistent with what another panel holds under identical circumstances and with what other circuit courts hold. Inter- and intra-circuit inconsistency in the enforcement of federal constitutional rights is its own constitutional violation, and the statute is unconstitutional on its face. Under such circumstances, the death penalty will strike like lightning--there is no provision for, much less guarantee of, uniformity in the handling of similarly situated Applicants.

b. The standard for determining whether an Applicant is permitted to file a second or subsequent petition is too vague to protect Applicants from State court violations of federal constitutional rights. Whether a Petitioner receives federal review of a constitutional challenge in a second petition setting will depend upon whether he or she makes a "prima facie" showing of a violation of a retroactively applied constitutional right. "Prima facie" showing is not defined by the Act.

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2. Undersigned counsel have been unable fully to digest the provisions, much less to research, brief, and plead all of the ramifications, of the Act. It appears that Applicant is the first person in the country to whom the Act will be applied.

c. The Act allows the filing of a second petition with respect to a "previously unavailable" claim, but does not define what previously unavailable means.

d. The Act requires federal courts to defer to wrong state court applications of federal constitutional law.

e. The Act allows the execution of a person who is in fact innocent but who had a constitutional trial;[3] and

f. The Act does not allow a federal court to announce and apply in the Applicant's case a federal constitutional violation of the most bedrock sort which infected the truth-seeking process.[4]

g. The Article III power of federal judges cannot be constrained by Congress. Congress cannot require federal judges both to entertain, and to rule a specific way regarding, civil actions. Under the Act, Congress requires federal courts to entertain, but to rule in certain ways regarding, habeas corpus actions. This violates the doctrine of separation of powers, and is unconstitutional.[5]

The application of this statute to Applicant violated these and other constitutional guarantees. The issues deserve more considered treatment than is allowed by the existence of a one

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3. See Section III, infra.

4. See Section III, infra.

5. The Act does not amend 28 U.S.C. Sections 2241 or 2254 (a), which confer jurisdiction on the federal courts to entertain petitions for writs of habeas corpus. Federal courts still have jurisdiction; Congress has acted only to direct results.

week old statute. Under these circumstances, and under the prevailing case law, Petitioner is entitled to stay of execution. See Barefoot v. Estelle, 463 U.S. 880 (1983).

II.

THE LOWER COURT'S FIRST IMPRESSION OF THE ACT WAS INCORRECT AND DECIDED ISSUES WHICH HAVE NOT BEEN BUT WHICH OUGHT TO BE DECIDED BY THIS COURT, INCLUDING A.) WHAT IS A PRIMA FACIE SHOWING?, AND B.) WHAT DOES IT MEAN FOR A CLAIM TO HAVE BEEN PREVIOUSLY AVAILABLE?

Petitioner contends that he made a prima facie showing that his claim under Cage v. Louisiana, 498 U.S. 39 (1990), satisfies the requirements of Sec. 106(b)(2)(A), and that he was entitled to a stay of execution and permission to file his habeas corpus petition in the district court. A prima facie showing is a showing which on its face may entitle a petitioner to relief. Petitioner is entitled to district court consideration of his claim upon a prima facie showing that a) his claim is one which has been applied retroactively[6] and b) it was not previously available to him. Petitioner pled that Cage error occurred, that Cage is retroactive, and that at the time he filed his first petition the retroactive application of Cage was not available.

In denying permission to file a petition, the circuit court assessed both the Petitioner's showing and the Respondent's response, which is the antithesis of a prima facie assessment. Prima facie is "on its face" without any showing from the Respondent. Further, the circuit court assessed the merits of the claim, which it had no jurisdiction to do, under the Act. If

6. Respondent concedes the retroactivity issue.

a prima facie showing is made, the district court decides the merits.[7]

Plainly Petitioner made a prima facie showing. The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970); see also Jackson v. Virginia, 443 U.S. 307, 315-16 (1979). This Court has consistently recognized that the reasonable doubt standard is a bedrock element of due process and "plays a vital role in the American scheme of criminal procedure." Winship, 397 U.S. at 364. The Court has also emphasized that, "[i]n the administration of justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." Estelle v. Williams, 425 U.S. 501, 503 (1976).

As this Court has explained, the concept of reasonable doubt means that the trier of fact must be convinced of the defendant's guilt "with utmost certainty." In re Winship, 397 U.S. 358, 364 (1970). Similarly, the Court has held that to convict, jurors must reach "a state of near certitude." Jackson v. Virginia, 443 U.S. 307, 315 (1979); see also Lanigan v. Maloney, 853 F.2d 40, 47 (1st Cir. 1988) (concept of proof beyond a reasonable doubt must "convey the critical point that, while absolute certainty is

7. Sec. 106 (b)(3)(A), (B) and (C); see also Nutter v. White, 39 F.3d 1154, 1158 (11th Cir. 1994).

unnecessary, a belief in guilt at least approaching absolute certainty was required") (emphasis in original). The "utmost certainty" referred to in Winship refers to the highest level of certainty attainable in the domain of human affairs, involving factual questions depending on empirical evidence, i.e., the level of certainty a notch shy of the absolute certainty available only in the domains of physics or mathematics.

Petitioner has maintained his innocence of the crime in this case, he waived his right to silence and testified to his innocence, and he continues to state, unequivocally, that he is innocent. Objectively, there is a very real and substantial probability that he is innocent and that his conviction resulted from an antiquated autopsy and crime scene investigation system in Georgia, see sub-section A, infra, and an unconstitutional, and equally antiquated, jury instruction and voir dire which equated the absence of reasonable doubt with "moral certainty" and allowed the jurors to accept the state's theory without "utmost certainty" of guilt. See sub-section C, infra; Cage v. Louisiana, 498 U.S. 39 (1990). This Court (and the lower court) has held that such jury instructions constitute structural (and to be retroactively corrected) constitutional error. Sullivan v. Louisiana, 113 S. Ct. 2078 (1993); Nutter v. White, 39 F.3d 1154 (11th Cir. 1994). See sub-section B, infra. Because of this violation, and because this claim was not previously available to Petitioner, see sub-section C, infra, the Petitioner should have

been allowed to file a habeas corpus petition in the district court.

A. Cage Error Cannot be Harmless, But There Was Manifest Harm in this Case--Petitioner is Innocent

"Time of death was a critical issue at trial."[8] It was critical because if death occurred after November 25, 1981, Petitioner was innocent. "His alibi [thereafter] was a good one--the police had him under surveillance ...." Felker v. Thomas, 52 F.3d 907, 909-910 (11th Cir. 1995). If the victim was killed after November 25, 1981, someone else killed her.[9]

The victim's body was found on December 8, 1981. If she had been dead less than thirteen days, then Petitioner did not kill her.

An autopsy was performed by Warren Tillman. He was an agent with the Georgia state crime lab. He was not a medical doctor. He told his colleagues--law enforcement authorities--that the victim had been dead for three days, or from eight to ten days

8. Brief on behalf of the Appellee By the Attorney General, filed in the Georgia Supreme Court on direct appeal, at p. 112.

9. While there was other circumstantial evidence of Petitioner's guilt, he would not have been convicted if the time of death was after the police surveillance began.

after Petitioner was placed under surveillance.[10] This meant that Petitioner was innocent.

After further discussions with his associates, "Tillman advised investigators that the victim could have been dead for two weeks prior to the discovery of her body, [and] a search warrant was issued for the search of appellant's automobile." Pelker v. State, 314 S.E.2d at 639.[11]

Thus, Tillman told his associates that the victim had been dead for three days, which made Petitioner innocent. Tillman later told his associates the victim could have been dead long enough for Petitioner to have killed her.

Worse, Tillman was allowed to tell the jurors--as an expert--that the time of death could have been up to two weeks before the victim's body was discovered. Tillman's testimony was the sole evidence that the murder occurred at a time when Petitioner

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10. Sworn statements submitted for the purpose of obtaining search warrants on December 9, 1981, recited that "the affiant has learned from medical examination, that she died approximately three (3) days prior to her discovery." See Exhibits 1 and 2, December 21-22, 1982, hearings. The affiant testified pre-trial that Tillman "stated [after the autopsy] that he felt like she had been dead about three days." Id. at 24; see also id. ("Based on what Mr. Tillman had told us about the possibility of her being dead three days prior to her being discovered ....").

11. This search warrant was obtained on December 23, 1981, but it, unlike the December 9, 1981, warrants, contained no time of death. Nevertheless, officer Sullivan testified that the December 23, 1981, warrant was obtained because "we had heard from Dr. Tillman that, through a little bit further investigation, that it was possible that she had been dead in the, or had been dead from the time she had come up missing or possibly for two weeks." December 21-22, 1982, hearings, p. 29. Again, Tillman was not a medical doctor.

could have been guilty, i.e., before Petitioner's police supported alibi.[12]

No physician who has reviewed the evidence in this case agrees with Tillman. Indeed, one of the world's leading experts on cause and time of death, Dr. Werner Spitz, a physician whose authoritative text was referred to throughout trial,[13] has concluded that the time of death was long after Petitioner was placed under police surveillance. See Appendix 3.[14]

Having non-physicians conduct autopsies and testify with respect to cause and time of death has caused great controversy in Georgia and has led to reform. See Appendix 5.[15] Even more

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12. Furthermore, the only forensic evidence that the victim was bound and hence tortured came from Tillman's testimony. Petitioner's physicians disagree with this testimony and from the evidence cannot say that the victim was raped or sodomized. See Appendix 4.

13. Dr. Werner Spitz is the editor of the principal textbook of forensic pathology, Medicolegal Investigation of Death, third edition, Charles C. Thomas, publisher, Springfield, Illinois, 1993. An earlier edition of this text was referred to by counsel at trial repeatedly. See, e.g., R. 361, 383-86, 392-93, 404, 410-11, 450-53, 1003-04.

14. Jonathan Arden, M.D., an expert medical examiner, agrees that the death occurred after Petitioner had an alibi, and disagrees with Tillman's testimony that the victim was raped, bound, and tortured. Appendix 4.

15. See Appendix 5: "Getting Away With Murder," The Atlanta Constitution, June 4, 1989 ("'Georgia is the only state in the country and the only jurisdiction in the western world that allows non-physicians to do autopsies.'"); "Critics advocate death of Georgia Coroner System." The Atlanta Constitution, August 15, 1988, A1 ("'The coroner system in this state should have gone out with the horse and buggy.'"); "Experts Urge lawmakers to Revamp Coroner's System," The Atlanta Constitution, September 14, 1989, C1 ("Besides an autopsy, death scene investigations--and standards for conducting them--need to be adopted in Georgia, the experts told legislators ....").

controversial is the policy of allowing non-physicians from the state crime lab to conduct autopsies and testify for the state in criminal prosecutions,[16] as occurred in Petitioner's case.

The peril of having non-physician, state advocates testify to critical issues with respect to time and manner of death is most acute in a capital context where the tolerated margin of error with respect to fact-findings is lowest. The peril in Petitioner's case turned into actual harm--Tillman was wrong, the jury relied upon him,[17] and no other person in the country would be sentenced to death on the basis of such testimony.

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16. The freedom of forensic pathologists to present their findings in court -- whether in favor of the defense or the prosecution -- is at the heart of the debate over a bill that would change Georgia's system of death investigation.... Georgia remains the only state in the nation that allows non-physicians to perform autopsies.... National model standards for medical examiners indicate that, ideally, those who perform autopsies should be free from any political pressure.

App. 5, "Question of control dominates bill to upgrade coroners system," The Atlanta Constitution, September 12, 1990, E3. Problems of non-independence and bias arise when the witness about cause and time of death is a Georgia Bureau of Investigation employee. Id.

17. At trial, Petitioner presented medical testimony that the time of death made it impossible for him to be guilty. The jury verdict credited Tillman.

B. Unconstitutional Jury Instructions Allowed the Jury to Convict Without "Utmost Certainty," In re Winship, 397 U.S. 358, 364 (1970), of the Time of Death

To constitutionally convict, the jury had to be convinced to the utmost certainty and to a "near certitude" that the victim was killed before Petitioner was placed under surveillance. The jury instructions, and the jurors' voir dire pledges to follow them, allowed conviction based upon less than utmost certainty.

The jurors were instructed as follows:

> In a criminal case ... the State must prove each of its contentions beyond a reasonable doubt and to moral certainty.
>
> ....
>
> **The state, however, is not required to prove his guilt beyond all doubt. Moral and reasonable certainty is all that can be expected in a legal investigation.**
>
> A reasonable doubt is defined as a doubt which is based on the evidence, a lack of evidence or a conflict in the evidence. It is doubt that is reasonably entertained as opposed to a vague or fanciful or farfetched doubt.

R. 1102-03.

The jurors who served were directly asked during voir dire if they would apply the standard of reasonable doubt embodied in the single phrase: "Moral and reasonable certainty is all that can be expected in a legal investigation." The jurors agreed to do so.[18]

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18. Ten of the jurors selected to determine Petitioner's guilt were, during voir dire, expressly told, and they agreed to apply, the precise definition of proof beyond a reasonable doubt set out in bold above. See R. 215, 1610 (juror Miller); R. 265, 1611 (Mayo); R. 313-14, 1612 (Sirmon); R. 393, 1612-13 (May); R. 586-87, 1614 (Brady); R. 629, 1614 (Griffin); R. 792, 1616 (Daffron); R. 973, 1618 (Boltz); R. 1023, 1619 (Crane); R.

(continued...)

Equating proof beyond a reasonable doubt with proof "to a moral certainty" is unconstitutional because moral certainty can be established with less proof than can proof beyond a reasonable doubt. The trial court in Petitioner's case equated moral certainty with the absence of reasonable doubt. In Cage v. Louisiana, 498 U.S. 39 (1990), this Court found instructions very similar to those given in Petitioner's case to be constitutionally invalid. The Court held that the Louisiana state trial court had violated the due process principles established In re Winship, 397 U.S. 358 (1970), when it defined reasonable doubt as "such doubt as would give rise to a grave uncertainty," "an actual substantial doubt," and requiring "not an absolute or mathematical certainty, but a moral certainty." Cage, 498 U.S. at 40 (quoting State v. Cage, 554 So.2d 39, 41 (La. 1989)). The Cage Court noted that its previous decisions had repeatedly emphasized the constitutional underpinnings of the beyond-a-reasonable-doubt standard in criminal trials.

The reasonable doubt instruction condemned by the Court in Cage is in all material respects identical to the charge given in Petitioner's case. The voir dire and the jury instructions clearly expressed the notion, condemned by the Supreme Court in Cage, that the beyond-a-reasonable-doubt standard is "synonymous"

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18. (...continued)
1069, 1619 (Johnson). The other two jurors agreed that they would convict if they were "satisfied in [their] heart and conscience of the defendant's guilt." R. 25, 1609 (Hill); R. 189-90, 1610 (Yawn). Juror Yawn agreed not to "require[the state] to prove his guilt beyond all doubt, just to a reasonable and moral certainty." R. 190 (emphasis added).

with "proof to a moral certainty," that any doubt must be more weighty than "vague," and that moral certainty is "all that can be expected" or required.[19] Given the supposed circumstances of this case--abduction, rape, sodomy, torture and a history of sexual deviancy--juror morals could easily, but unconstitutionally, have entered into the reasonable doubt equation.[20]

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19. The phrase "moral certainty" in contemporary parlance means a level of certainty distinctly below that required by proof beyond a reasonable doubt. See Victor v. Nebraska, 114 S.Ct 1239, 1247 (1994). To the extent that "moral certainty" is currently understood as denoting only the probability or even a strong probability of a fact, it is inconsistent with the requirement of "utmost certainty" enunciated in Winship, and instead conveys a meaning far more consistent with the legal concept of "preponderance of the evidence," or at most "clear and convincing evidence."

20. Besides diluting the state's burden of proof, the inclusion of "moral certainty" in a reasonable doubt instruction invites the jury to base their decision on feelings rather than facts, on emotion rather than on evidence. See Perez v. Irwin, 963 F.2d 499 (2d Cir. 1992) ("the concern is that the use of the words [moral certainty] might lead a jury to reach a verdict based on feelings rather than on the facts of the case"). This occurs because the phrase "moral certainty" has acquired an additional meaning, apart from the mere "probability" definition noted above. A cluster of current dictionary definitions define "moral certainty" as a strong personal belief in a particular fact or idea in the absence of or regardless of objective evidence. For example, Webster's Third New International Dictionary - Unabridged (1986) defines "moral certainty" as "based on an inner conviction"; and "virtual rather than actual, immediate, or completely demonstrable." Id. at 1468, col. 3; see also The American Heritage Dictionary of the English Language 1173, col. 2 (3d ed. 1993) (defining moral certainty as "[b]ased on a firm conviction, rather than upon the actual evidence: A moral certainty") (emphasis added); Webster's II New Riverside Dictionary 769, col. 1 (1984, 1988) (moral certainty defined as "[b]ased on strong likelihood of conviction rather than on solid evidence").

(continued...)

C. Cage is to Be Retroactively Applied

The Cage holding is, ineluctably, retroactive. The State agrees. In Sullivan v. Louisiana, 113 S. Ct. 2078 (1993), the Court, applying Cage, noted that reasonable doubt instructional error is a "'structural defect[] in the constitution of the trial mechanism'" because the jury guarantee that it violates is a "'basic protectio[n]' whose precise effects are immeasurable, but without which a criminal trial cannot reliably serve its function." Id. at 2082-83 (quoting Arizona v. Fulminante, 499 U.S. 279, 310 (1991)). The Sullivan Court concluded:

> The right to jury trial reflects, as we have said, "a profound judgment about the way in which law should be enforced and justice administered." Duncan v. Louisiana, 391 U.S. [145], 155. The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error."

113 S.Ct. at 2082.

Petitioner has challenged the constitutionality of the jury instructions given at the guilt or innocence phase of his trial, relying on the Court's unanimous per curiam opinion in Cage.

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20. (...continued)
In light of this additional meaning of the phrase "moral certainty," the damaging potential of the defective reasonable doubt instruction in Petitioner's case is apparent. The jury was exposed to many shocking and lewd details, many of which we now know to be untrue. Beyond this, the prosecutor's closing argument incited the jury to supplant an objective evaluation of the facts with their own emotional reactions to what they had heard. Because the trial judge equated reasonable doubt and moral certainty, Petitioner was thus deprived of his right to have a jury impartially determine whether the state had met its burden beyond a reasonable doubt.

Because Petitioner's direct appeal was final before the Court announced Cage, however, a federal habeas court may entertain the claim only if the Cage holding does not constitute a "new rule" or if the holding "alter(s) our understanding of the bedrock procedural elements essential to the fairness of a proceeding." Sawyer v. Smith, 497 U.S. 227, 242 (1990); see also Teague v. Lane, 489 U.S. 288 (1989); the Act, Sec. 106(b)(2)(A). Clearly (1) Cage did not announce a "new rule" of criminal procedure, or (2) if new, the rule in Cage falls within the "fundamental fairness" exception to the nonretroactivity principle of Teague v. Lane, 489 U.S. 288 (1989).

D. This Claim Was Not Previously Available

Cage was decided after Petitioner was denied relief in the state habeas corpus court in 1990. Petitioner filed a federal petition on April 28, 1993, and it was placed on the district court's civil docket on June 2, 1993. Sullivan was decided June 1, 1993. Petitioner thus made a prima facie showing that the retroactive application of Cage to Applicant's case was not available before the filing of this application.

III.

PETITIONER IS ENTITLED TO HABEAS CORPUS RELIEF ON HIS CLAIM THAT THE PROCESS THROUGH WHICH HE WAS CONVICTED WAS UNCONSTITUTIONAL AND THAT HIS EXECUTION WOULD VIOLATE THE EIGHTH ND FOURTEENTH AMENDMENTS

Under the Act, a claim that a person is innocent and that their execution would violate the Eighth and Fourteenth Amendments, see Herrera v. Collins, 113 S. Ct. 853 (1993), cannot

be heard at all. A claim that a person's constitutional rights were violated at trial in a manner that will constitute a newly announced, yet bedrock and retroactive, rule (the second Teague exception) cannot be heard. Petitioner presents both of these habeas corpus claims here, because there is no other forum.

A. Petitioner is Innocent of Murder

Petitioner presented testimony at trial from an expert physician that the time of death was three to five days before the victim's body was discovered, making it impossible for Petitioner to be guilty. The State attacked this physician because he had been paid to testify, and because he had supposedly made a mistake in the past. The jury obviously chose to believe the State's non-physician, agent, and revised, "expert" opinion.

Tillman's opinion ought not to provide the sole basis for executing Petitioner. Tillman's opinion is not reliable. Petitioner has presented all of the forensic evidence regarding the victim to two highly qualified physicians, both of whom disagree with Tillman's revised "opinion" regarding time of death.

a. Dr. Spitz

Dr. Spitz is the nationally recognized expert on forensic pathology. He has reviewed the materials relevant to a determination of time of death and has concluded that death occurred when Petitioner could not have been responsible:

I am a licensed physician, specializing in forensic pathology. I received an M.D. degree from The

Hebrew University, Hadassah Medical School, in Jerusalem, Israel, in 1953. I completed an internship and residency in forensic pathology at Hadassah Medical School from 1953-1959, and I was a research fellow in forensic pathology at the University of Maryland from 1959-1961. I have held numerous faculty, hospital, and other professional appointments in forensic pathology. I have been certified by the American Board of Pathology in Forensic Pathology and Anatomical Pathology, and I am a member of a number of professional societies in medicine and the forensic sciences. I am the editor of the principal textbook of forensic pathology, **Medicolegal Investigation of Death**, third edition, Charles C. Thomas, publisher, Springfield, Illinois, 1993. The copy of my curriculum vita which is attached as Appendix A details my professional experience and background.

At the request of counsel for Mr. Ellis Wayne Felker, I have reviewed background materials relevant to the death of Joy Ludlum. These include the report of the autopsy of Joy Ludlum, the testimony of Warren Tillman, prosector, the testimony of Dr. James Whitaker, pathologist, the testimony of Dr. Joseph Burton, defense pathologist, Dr. Larry Howard, Crime Lab Director, and Steven Hartman, geologist, photographs of the scene where the body was discovered and photographs of the autopsy, and local climatological data provided by the U.S. Department of Commerce.

Based upon this information and my experience of forty-three years in the field of forensic pathology, it is my opinion to a reasonable degree of medical certainty that the death of Joy Ludlum was properly estimated by Warren Tillman, who performed her autopsy, as having occurred 3-5 days prior to the morning of December 8, 1981, when her fully dressed body was recovered in Scuffle Creek.

The minimal decomposition of the body, as described in the autopsy report and as evident in the photographs, in consideration of the prevailing climatic conditions and the temperature of the water in the creek at that time of year are consistent with this estimate.

I have testified as an expert witness in the field of forensic pathology in state and federal courts throughout the United States on many occasions. To my knowledge, Georgia is the only state in the country

which allows a non-physician to perform an autopsy and testify about the time of the victim's death.

Appendix 3 (emphasis added).

b. **Dr. Arden**

Dr. Arden, an expert medical examiner, agrees with Dr. Spitz:

I am currently the acting First Deputy Chief Medical Examiner for the City of New York and have held that position since 1991. I graduated from the University of Michigan Medical School in 1980 with an M.D. Following that, I completed a residency in anatomic pathology at New York University Medical Center, from 1980 to 1983. I participated in a forensic pathology fellowship at the Office of the Chief Medical Examiner, State of Maryland from 1983 to 1984. I was board certified by the American Board of Pathology, Anatomical and Forensic Pathology, in 1985 and am licensed to practice medicine in New York and Delaware. I have been a practicing medical examiner for twelve years, practicing exclusively as a forensic pathologist. I have testified as an expert witness in over 240 cases. In almost all of these cases, I was called as a witness by the state.

I was recently asked by an attorney for Wayne Felker to review files and records in the above captioned case. I reviewed the following files:

1. Autopsy Report on Joy Ludlum;
2. Testimony of Warren Tillman;
3. Testimony of Dr. James Whitaker;
4. Testimony of Dr. Larry Howard;
5. Testimony of Dr. Joseph Burton;
6. Testimony of Stephen Hartman;
7. Rebuttal testimony of Dr. James Whitaker;
8. Autopsy and crime scene photographs of the body.

I was asked by the attorney to review these files to determine the time of death of the victim. Based upon my review of these records, I conclude to a reasonable degree of medical and scientific certainly that the victim had been dead only three to five days at the time the body was discovered. This finding is consistent with the initial findings of Warren Tillman, the autopsist for the state. It is also consistent with the findings and trial testimony of Joe Burton, M.D.

The figure of three to five days is based upon my independent review of the above listed records and photographs and my extensive experience in the field of forensic pathology. A number of factors recorded in the autopsy report and photographs support this finding.

The photographs indicate that the body is in a very good state of preservation. The body is intact, not significantly marbled, with good features, no protrusion of the eyes, no darkened face, good texture of skin, and a general lack of other post-mortem changes. The photographs and autopsy report do not support a description of this body as decomposed. Initially I would note the absence in the autopsy report of any mention of rigor mortis. One of the critical observations that should be made both at the time the body is discovered and at the time of the autopsy is the degree of rigor mortis or lack of rigor mortis. Rigor mortis is one of the cardinal descriptors of the time of death, and the best time to get that information is from the scene. This is information that should always be recorded in an autopsy, yet the autopsy in Mr. Felker's case fails to mention anything about rigor mortis. The photographs of the body from the scene do indicate the presence of rigor mortis, both from the position of the arms and the legs and from the general position of the body. For example, State's Exhibit 10 shows legs bent slightly at the knees with the knees pointing upward and slightly out at an angle, clearly suggesting the presence of rigor mortis. If rigor were not present, the forces of gravity would cause the knees to spread apart and fall toward the ground, and/or the legs would straighten at the knees.

Under average conditions and with an average person, detectable rigor mortis is generally seen in a body within two to three hours, and after five to six hours there is strong evidence of rigor that is noticeable in most parts of the body and takes pressure to overcome. By twelve hours, rigor mortis generally reaches its maximum level. The period of time necessary for rigor to dissipate is roughly equal to the time of onset, if the body is not disturbed. In average conditions, the duration of rigor mortis would be between twenty-four to thirty-six hours, with a high estimate of forty-eight hours.

The victim was of average size. The submersion in cool water would slow down the onset and dissipation of rigor mortis. Testimony indicates that the average

temperature of the water was fifty to fifty-seven degrees, some fifteen to twenty degrees below the average temperature upon which the above calculations rely. The equation of one day in air equals two days in water that was in the testimony is a valid equation, and is relevant to both the process of rigor mortis as well as other post-mortem changes. The fact that this victim still showed signs of rigor mortis at the scene supports the finding that she was dead three to five days, and is patently inconsistent with a finding that she was dead fourteen days.

The photographs and records also do not indicate a great degree of skin slippage. The skin is slightly wrinkled, with some evidence of slippage, but a body that has been submerged in water for two weeks would show a much greater degree of skin slippage.

The autopsy report indicates that the body was in the earliest stages of decomposition. The condition of the victim's body is consistent with a body that had been in average temperature and conditions for one to two and one half days. For example, the report does not describe the organs as soft and pulpy, a condition that occurs as a body decomposes.

Additionally, there was no evidence of the purging of fluid from the nose and the mouth. This is a condition that occurs within a few days after death in a body that is not submerged. As noted above, it is accurate that a body that has been in water since death will be slightly better preserved than a body that is not submerged. Taking the fact of submersion of the body into account would provide a time of death of two to five days.

The green marbling described in the autopsy report is consistent with a body that had been dead for no longer than three to five days. The autopsy report describes marbling primarily around the anterior chest and abdomen. A body that had been dead for fourteen days would likely show much more extensive signs of marbling throughout the body. This extent of marbling was not indicated in either the autopsy report nor the photographs.

The autopsy was not conducted until twenty four hours after the body was removed from the water. After a body is removed from water, the decomposition process begins very quickly. Many of the signs reported by the autopsist to support his conclusion that the victim had

been dead for fourteen days may have been the result of the body's exposure to the air for twenty-four hours.

The condition of the body described in the autopsy report and depicted in the photos does not support a finding that the victim had been dead for many days and there is no medical or scientific basis for the finding that the victim had been dead for fourteen days prior to the discovery of the body. The lack of disturbance by aquatic life is noteworthy. Testimony indicates that turtles, fish and other aquatic life were present in the stream where the body was found. It is very common to have some evidence of animal activity on bodies that have been submerged, particularly in a body that had been submerged for two weeks.

The autopsy in this case was poorly done. Mr. Tillman had insufficient qualifications to be performing autopsies, particularly forensic autopsies. I was surprised to read that a person with no medical degree was performing autopsies in 1982, and that there were states where this was permissible. In my experience, I have never heard of non-physicians performing autopsies. To qualify as a pathologist, a person must first complete medical school. Then a three year minimum residency in pathology where all work is supervised and reviewed by a qualified pathologist is required. To become properly trained in forensic pathology, an additional one year residency in forensics is essential. In the majority of states, these requirements were the norm in 1982.

The first omission in the examination of this body was the failure of either the autopsist or anyone from his staff to attend the scene and make initial observations of the body. In fact, no observations concerning the condition of the body were made by anyone from the autopsist's staff until the autopsy was performed twenty-four hours after the body was discovered. It is routine and necessary in this field for either the medical examiner or a trained investigator to visit the scene where the body was discovered and to make preliminary observations about the condition of the body. These observations include the degree of rigor mortis in the body, any evidence of lividity, the texture of the skin, and other evidence of post mortem deterioration. If an investigator from the medical examiner's office attends the scene rather than the medical examiner, he or she should be both forensically and medically trained. The autopsist in Mr. Felker's case did not have sufficient

qualifications to be designated as pathologist investigator, much less as the primary autopsist.

Second, the autopsist failed to take sections of the victim's body that should have been taken. Sections of the genitalia would have assisted in the determination of whether the victim was raped or sodomized. These sections could have shown the extent of the alleged bruising, whether the bruising was internal and the age of the bruising. The pathologist's testimony about the dilatation being indicative of an object being inserted in the anus after death is mere conjecture and is not supported by any available scientific evidence. Additionally, the photographs show no evidence of injury or bruising to either the anus or the vagina, contrary to the testimony presented at trial.

The exhumation in this case provided no further information of value. The autopsist had failed to make the appropriate observations at the autopsy, so had insufficient evidence to support the time of death of fourteen days. After burial, the decision was made to exhume the body. The persons handling this procedure were unqualified to do so. When the body was exhumed, a local pathologist was brought in to observe, while a biochemist did the work. There is no indication that the pathologist participated in the autopsy other than by his mere presence. Records indicate that this was the only participation in the autopsy and related procedures by anyone with any medical experience. No samples were taken during the exhumation which would assist in determining the time of death, the existence of genital bruising, or the degree of injury prior to death, critical issues in the prosecution of Mr. Felker.

The photographs and records do not support the conclusion that there were circumferential contusions around the vagina and anus indicative of an object being entered into the orifices with force. There is no evidence of bruising to the vagina or anus. As noted in the autopsy report, swabs of the vagina and anus revealed no evidence of semen. Based upon all available scientific and medical evidence, it is my opinion to a reasonable degree of medical certainty that there is no evidence suggesting forced entry by a penis or foreign object in any orifice of the victim.

The conclusions concerning the bruising around the wrist and ankle area are supported neither by the photographs nor by the autopsy. Photographs of the

extremities show no evidence of binding. The photos show only one bruise on the left wrist and one bruise on the ankle. Both of these bruises are oval, non-descript bruises, more consistent with a blow to the body than with binding of the extremities. State's Exhibit 47, a photograph of the bruise on the wrist, shows no indication that this bruise extended around the wrist as would be expected if the wrist had been bound. The bruise has no pattern, no linearity, is not narrow, and runs up the wrist rather than across the wrist, all of which is contrary to what is generally seen with a bruise resulting from binding. There are no ligature marks, no marks of twine that has "cut into" the arm, no evidence of adhesive from tape on the wrist, and no other marks indicating binding. State's Exhibit 12, a photograph of the body at the scene, indicates that the bruise did not extend to the back of the wrist. With a ligature on the wrist, generally more pressure is exerted and more constriction is evidenced on the bone extending to the thumb. But photographs show no evidence of any bruising on this bone, nor is any bruising on this bone reported in the autopsy report. In summary, there is no feature that is specific or diagnostic to support the finding that the wrist was bound.

The bruise on the ankle is similar to the bruise on the wrist. Again, there is no evidence of any ligature nor any other factors which would suggest binding. State's Exhibit 48, a photograph of the bruise on the ankle, shows an oval bruise that does not extend around the ankle. This bruise is more consistent with a blow to the ankle, the ankle making contact with an object as a result of a kick, or the result of a struggle than with a ligature around the ankle. Again, there is no specific or diagnostic feature that would support a finding that this bruise on the ankle was a result of binding. Both the bruise on the ankle and the bruise on the wrist have been over-interpreted in the testimony, resulting in findings that are not supported by the scientific and medical evidence.

Conclusion

Based upon my review of the autopsy notes and all other files listed above, it is my unequivocal opinion that the victim in this case was not dead for fourteen days. It is my professional opinion to a reasonable degree of medical and scientific certainty and based upon all relevant evidence that the time of death of

this victim was three to five days prior to the discovery of the body.

Appendix 4 (emphasis added).

Under these circumstances, Petitioner is innocent of murder and his execution would violate the Eighth and Fourteenth Amendments. The state has no process for assessing this claim, and the circuit court would not hear it.

B. Having a State Agent, Non-Physician, Testify to the Critical Issue of Time of Death Violates Due Process and the Prohibition on Cruel and Unusual Punishment

Capital proceedings must be accompanied by all the accoutrements of due process "befit[ting] a decision affecting the life or death of a human being." Ford v. Wainwright, 477 U.S. 399, 411 (1986). It is axiomatic that procedures surrounding the judicial finding of facts which will result in a person living or dying must "aspire to a heightened standard of reliability." Id at 411; see also Eddings v. Oklahoma, 455 U.S. 104, 117-18 (1982) ("[T]his Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake.") (O'Connor, J., concurring). "That need is greater still because the ultimate decision [in Petitioner's case] will turn on the finding of a single fact, not on a range of equitable considerations." Ford, 477 U.S. at 412,

The sole, determinative, issue in Petitioner's case was the time of the victim's death. The only evidence that the death

occurred when Petitioner could have caused it was the "expert" testimony of a non-physician employed by the prosecution arm of the State of Georgia. All physician testimony on the time of death makes the Petitioner innocent. The process employed by the State of Georgia for determining whether the Petitioner was guilty was seriously flawed, and the State has no legitimate interest in such a flawed process. Ake v. Oklahoma, 470 U.S. 68, 80 (1985)("[t]he State's interest in prevailing at trial . . . is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases").

The process employed to determine that Petitioner was guilty and deserved the death penalty violated the Petitioner's right to due process of law and to be free from cruel and unusual punishment, guaranteed by both the United States and the Georgia Constitutions. The State of Georgia is the only jurisdiction in the western world which would allow a conviction based upon the testimony provided by the state's expert in this case. Plainly Georgia is out of step, is wrong, and is poised to execute a person whose guilt was unfairly and wrongly determined. See Herrera v. Collins, 113 S. Ct. 853 (1993)(majority of court accepts that it would violate the constitution to execute an innocent person); Griffin v. Delo, 33 F.3d 895, 908 (8th Cir. 1994)(Supreme Court in Herrera declared "that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional,

and warrant federal habeas relief if there were no state avenue open to process such a claim.").

CONCLUSION

Petitioner respectfully requests that the Court enter an order staying his execution and granting the relief requested.

Respectfully submitted,

M. ELIZABETH WELLS
Georgia Bar No. 747852
STEPHEN C. BAYLISS
Georgia Bar No. 043348
Georgia Resource Center
101 Marietta Street
Suite 3310
Atlanta, Georgia 30303
404/614-2014
FAX 404/614-4656

By: M. Elizabeth Wells

Exhibit "A"

No. 95-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

In re Ellis WAYNE FELKER

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, ELLIS WAYNE FELKER, by and through his undersigned counsel, asks leave to file the attached Petition for Writ of Habeas Corpus, For Appellate or Certiorari Review of the Decision of the United States Circuit Court For the Eleventh Circuit, and For Stay Of Execution, and to proceed in forma pauperis, pursuant to Rule 39 of the Rules of this Court.

Petitioner's Affidavit in support of this motion is attached hereto as "Exhibit A."

Respectfully Submitted,

STEPHEN C. BAYLISS
Georgia Bar # 043348
M. ELIZABETH WELLS
Georgia Bar # 747852
Georgia Resource Center
101 Marietta Tower, Suite 3310
Atlanta, Georgia 30303
(404) 614-2014

No. 95-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

In re Ellis WAYNE FELKER

AFFIDAVIT OF POVERTY

I, ELLIS WAYNE FELKER, declare that I am the Petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceedings or to give security therefor, and that I believe that I am entitled to relief.

1. Are you employed? Yes ____ No ✓

   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer. _____

   b. If the answer is "no," state the date of last employment, and the amount of salary and wages per month which you received. self-employed thru Dec. 1981 - no salary of any kind. Merely took money from business as needed

2. Have you received within the last twelve months any money from the following sources?

a. Business, profession or form of self-employment? Yes___ No✓
b. Rent payments, interest, or dividends? Yes___ No✓
c. Pensions, annuities, or life insurance payments? Yes___ No✓
d. Gifts or inheritances? Yes___ No✓
e. Any other sources? Yes___ No✓

If the answer to any of the above is "yes," describe each source of income and state the amount received from each during the past twelve months. _____

3. Do you own any cash, or do you have any money in any checking or savings account?

Yes ✓ No ___ (Include any funds in prison account)
If the answer is "Yes," state the total value of the items owned. _____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothings)?

Yes ___ No ✓

If the answer is "Yes," describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute to their support. N/A

I understand that a false statement or answer to any question in this Affidavit will subject me to penalties for perjury.

Ellis Wayne Felker
ELLIS WAYNE FELKER

Sworn to and subscribed before me,
this the 24th day of April, 1996.

Notary Public
My Commission expires:

Notary Public, Clayton County, Georgia
My Commission Expires Jan. 17, 1998.

CERTIFICATE

I hereby certify that Petitioner, ELLIS WAYNE FELKER, EP-155370, has the sum of $117.64 on account to his credit at the Georgia Diagnostic and Classification Center where he is confined. I further certify that Petitioner likewise has the following securities to his credit according to the records of said Georgia Diagnostic and Classification Center.

None to my knowledge

Authorized Officer of Institution

No. 95-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

ELLIS WAYNE FELKER,

Petitioner,

-v-

TONY TURPIN, Warden,
Georgia Diagnostic and
Classification Center,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Motion For Leave To Proceed In Forma Pauperis upon Respondent by hand, addressed as follows:

Susan V. Boleyn, Esq.
Assistant Attorney General
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334

This the 2D day of May, 1996.

ATTORNEY FOR PETITIONER

TOTAL P.08

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAY - 2 1996
MIGUEL J. CORTEZ
CLERK

No. 96-1077

ELLIS WAYNE FELKER,

Petitioner,

versus

TONY TURPIN, Warden,
Georgia Diagnostic and
Classification Center,

Respondent.

On Application for Leave to File
Successive Habeas Corpus Petition

Before BIRCH, BLACK and CARNES, Circuit Judges.

B Y T H E C O U R T:

In Felker v. Thomas, 52 F.3d 907 (11th Cir.), extended on denial of rehearing, 62 F.3d 342 (1995), cert. denied, 116 S. Ct. 956 (1996), we affirmed the denial of habeas corpus relief as to the murder, rape, aggravated sodomy, and false imprisonment convictions, as well as the death sentence of Ellis Wayne Felker. The procedural history, evidence, and facts in the case are summarized in our prior opinions and in the Georgia Supreme Court's decision affirming his convictions and sentence on direct appeal,

Felker v. State, 252 Ga. 351, 314 S.E.2d 621, cert. denied, 469 U.S. 873, 105 S. Ct. 229 (1984).

On February 20, 1996, the Supreme Court denied Felker's petition for writ of certiorari seeking review of our decision denying his first federal habeas corpus petition. On April 17, 1996, the Superior Court of Houston County, Georgia, set May 2 through May 9, 1996, as the period during which Felker's execution would be carried out. On April 29, 1996, Felker filed a petition for writ of habeas corpus in the Superior Court of Butts County, Georgia. (It was his second state habeas petition; his first had been denied in 1990.) The Superior Court denied Felker's second state habeas petition on May 1, 1996, and the Georgia Supreme Court denied his petition for writ of certiorari at 11:00 a.m. ET, today.

Felker is now back before us. Yesterday afternoon, he lodged with this Court a request for a stay of execution and an application, pursuant to § 106 of the newly enacted Antiterrorism and Effective Death Penalty Act of 1996 ("the Act"), for permission to file a second federal habeas petition in the district court. He lodged a corrected application at 9:35 a.m. ET, this morning, and his application was formally filed at 11:30 a.m. ET, today.

Only last month, the Supreme Court emphasized the nonautomatic nature of stays of execution in second or successive habeas petition cases. Vacating the entry of a stay order by the Eighth Circuit in Bowersox v. Williams, 116 S. Ct. 1312 (1996), the Court reiterated that: "A stay of execution pending disposition of a second or successive federal habeas petition should be granted only

when there are substantial grounds upon which relief might be granted." Id. (citation and internal quotation marks omitted). The Supreme Court reminded us, in no uncertain terms, that: "[e]ntry of a stay on a second or third habeas petition is a drastic measure, and we have held that it is '"particularly egregious"' to enter a stay absent substantial grounds for relief." Id. (quoting Delo v. Blair, 509 U.S. 823, 113 S. Ct. 2922 (1993)).

Neither party in the present case contends that the standard applicable to stays of execution in second or successive petition cases has been changed by the Act.[1] Accordingly, we proceed to determine whether Felker has shown substantial grounds upon which relief might be granted, thus entitling him to the "drastic measure" of a stay of execution in this second petition case.

Felker requests that we enter a stay of execution "to allow full briefing on the many life or death issues created by the Act," which he contends violates the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments, the Supremacy Clause, and the Separation of Powers doctrine. Alternatively, he requests a stay "because the Applicant has satisfied the provisions of the Act and is entitled to a remand." (footnote omitted). We address the second alternative first.

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[1]Nothing that we say about the Act in this opinion concerns § 107, which applies special habeas corpus procedures to capital cases arising in those states that qualify under the provisions of the newly enacted 28 U.S.C. § 2261. There is no contention, yet, that the State of Georgia has shown — or even had an opportunity to show — that it qualifies to benefit from the special procedures established by § 107 of the Act. Whether it does is a question for another day.

I. FELKER'S CONTENTION THAT HE HAS SATISFIED THE PROVISIONS OF THE ACT AND IS ENTITLED TO A REMAND

Section 106 of the Act amends 28 U.S.C. § 2244(b) to read, in pertinent part:

> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--
>
> > (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> >
> > (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
>
> (3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
>
> (B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
>
> (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

Felker's application seeks an order from this Court authorizing the district court to consider a second or successive petition containing two claims. The first is a Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328 (1990), claim. Felker does not, and could not, contend that this is a claim the factual predicate of which "could not have been discovered previously through the exercise of diligence," within the meaning of new § 2244(b)(2)(B), because the factual predicate of the claim has been available on the record since Felker's trial.

As for § 2244(b)(2)(A), we have held that the Cage rule is retroactively applicable to cases that had completed direct review before the Cage decision was announced. Nutter v. White, 39 F.3d 1154 (11th Cir. 1994). However, we cannot find that Felker's Cage claim was "previously unavailable" to him when he filed his first habeas petition in 1993, which was long after Cage was decided. Felker argues in his application that the Cage claim was not available to him until Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078 (1993), made it obvious that the Cage rule was retroactive. Even assuming for present purposes the dubious legal premise that Cage was not available to Felker until the Sullivan decision was announced, the fact remains that Sullivan was decided on June 1, 1993, and Felker's first habeas petition was not formally accepted and placed on the docket until June 2, 1993.[2]

[2]Felker attempted to file his first habeas petition on April 27, 1981, but he did not pay the filing fee, and the magistrate judge denied his motion to proceed in forma pauperis. Not until Felker paid the filing fee on June 2, 1981, was the petition placed

And, of course, nothing would have prevented Felker from filing a motion to amend his first petition, even if the Sullivan decision had been released days or weeks after, instead of just before, the petition was filed. No answer was filed to the petition until August 6, 1993, and amendments to habeas petitions are freely permitted.

The other claim Felker seeks to litigate in a second or successive petition is a claim that "it violates the Eighth and Fourteenth Amendments for a non-physician, state agent to provide sole evidence upon which a jury relied to determine the critical issue of time of death." As we explain on pp. 17 - 19, below, this claim has no basis in the record, which contradicts it. However, even assuming for present purposes that there was some factual basis for the claim, it is not one which "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" as required by newly amended § 2244(b)(2)(A). Not only is there no new decision announcing a rule of law that has been made retroactively applicable, Felker does not cite any decisional law whatsoever in support of his proposition.

As for § 2244(b)(2)(B), Felker does not contend that the factual predicate for this claim could not have been discovered previously through the exercise of due diligence. The factual predicate, to the extent any exists, is apparent on the face of the

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on the civil docket. On June 9, 1981, the district court judge entered an order granting Felker's motion to proceed in forma pauperis and for appointed counsel.

trial record. The qualifications or lack of qualifications of Medical Examiner Warren Tillman were brought out on direct and cross-examination at the trial. There is no contention that Tillman did not testify truthfully concerning his background and qualifications. Moreover, as we explain on pp. 17 - 19, below, the facts underlying this claim if proven and viewed in light of the evidence as a whole, would not be sufficient to establish by a preponderance of the evidence, much less by clear and convincing evidence, that but for the alleged constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense. Accordingly, under the new Act, Felker is not entitled to an order from this Court authorizing him to file a second or successive petition raising this claim.

II. FELKER'S CONTENTION THAT THE ACT IS UNCONSTITUTIONAL

Felker also contends that the Act violates his rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments, as well as the Supremacy Clause and the Separation of Powers doctrine. His application provides very little discussion and cites no authorities for that proposition. However, given the time constraints facing us, we choose to analyze this claim not in the abstract, but instead in terms of whether the Act makes any difference insofar as a second or successive petition raising the claims Felker wants to litigate is concerned. Cf. Specter Motor Company v. McLaughlin, 323 U.S. 101, 105, 65 S. Ct. 152, 154 (1944) ("If there is one doctrine more deeply rooted than any other in the

process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable."); South Florida Free Beaches, Inc. v. City of Miami, Florida, 734 F.2d 608, 612 (11th Cir. 1984) (declining to address whether a statute was unconstitutional, because "[a]ny resolution of this issue would not affect the outcome of the case"). If Felker is barred from litigating the claims he presents under pre-existing law, then the Act's restrictions can have no unconstitutional effect on him. Cf. United States v. Missio, 597 F.2d 60, 61 (5th Cir. 1979) (affirming a denial of 28 U.S.C. § 2255 relief and holding that the district court correctly declined to address an issue involving the constitutionality of prior convictions where the same sentence would have been imposed even if those convictions had not been included in the presentencing report). Stated somewhat differently, if under pre-existing law Felker's claims do not present substantial grounds upon which relief might be granted, then his claim that the Act unconstitutionally restricts his presentation of such claims does not present substantial grounds for relief, either.

Under the pre-Act law concerning second or successive petitions, Felker would not be able to litigate the merits of the claims he presents unless he was able to establish cause and prejudice sufficient to excuse his failure to present those claims in his first petition, or failing that, unless the constitutional claims he attempts to litigate fall within the "narrow class of cases ... implicating a fundamental miscarriage of justice."

Schlup v. Delo, 115 S. Ct. 851, 861 (1995) (quoting McCleskey v. Zant, 499 U.S. 467, 494, 111 S. Ct. 1454, 1470 (1991)) (alteration in original). As it applies to claims relating to the guilt stage of a capital case, the fundamental miscarriage of justice exception to the cause and prejudice rule "requires the habeas petitioner to show that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" Id. at 867 (quoting Murray v. Carrier, 477 U.S. 478, 496, 106 S. Ct. 2639, 2649-50 (1986)). The petitioner must show that absent the constitutional violation "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." Id. That is a stronger showing than is required to establish prejudice, and will be found only in a "truly 'extraordinary'" case. Id.

We proceed to examine each of Felker's claims under that pre-Act second or successive petition law.

A. The Cage Claim

Felker cannot establish, and has not proffered, any valid cause for his failure to raise the Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328 (1990), claim when he filed his first petition. Cage was announced years before Felker filed his first petition, and Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078 (1993), was announced just before the petition was formally filed and certainly well within the time for amending it. See pp. 5 - 6, above. Nor has Felker established the fundamental miscarriage of justice exception to the cause and prejudice requirement. He has not established that it is more likely than not that no reasonable juror would have convicted him but for the reasonable doubt jury instructions that were given in this case. Accordingly, pre-Act second or successive petition doctrine bars the Cage claim. It is not necessary to our application of pre-Act second or successive petition law to decide whether the claim also lacks merit. However, in the interest of completeness we also note that the claim, which can be decided based upon the trial record, does lack merit.

Felker argues that the trial court's reasonable doubt instruction violated his due process rights because the instruction allowed the jury to convict him based on less than a standard of utmost certainty.[3, 4] Felker contends that by equating proof

[3]The trial court's instruction is affixed to this opinion as Appendix A.

beyond a reasonable doubt with proof "to a moral certainty" the jury was allowed to convict based on less proof than that required to convict beyond a reasonable doubt.

In Cage, the Supreme Court held that a jury instruction that:

> equated a reasonable doubt with a "grave uncertainty" and an "actual substantial doubt," and stated that what was required was a "moral certainty" that the defendant was guilty ... suggest[ed] a higher degree of doubt than is required for acquittal under the reasonable-doubt standard. When those statements are then considered with the reference to "moral certainty," rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

498 U.S. at 41, 111 S. Ct. at 329-30. The Supreme Court clarified its holding in Cage in Victor v. Nebraska and its companion case, Sandoval v. California. __ U.S. __, 114 S. Ct. 1239 (1994). There the Court held that although no particular words are required to define reasonable doubt, the trial court must correctly explain the standard in articulating the prosecution's burden of proof. Id. at __, 114 S. Ct. at 1243.

We described our method of review of a reasonable doubt charge in Harvell v. Nagle, 58 F.3d 1541 (11th Cir. 1995), petition for cert. filed, ___ U.S.L.W. ____ (Jan. 17, 1996) (No. 95-8450):

[4]We note that Felker does not challenge the "two inferences" language in the jury charge, i.e., that portion of the charge in which the court stated that, "if the circumstances in the case are subject to equally reasonable constructions, one indicating guilt and the other innocence, you are obligated under the law to accept that construction indicating innocence." (R. 1105). We do not, therefore, address this possible contention.

> When reviewing reasonable-doubt charges, we consider the instruction as a whole to determine if the instruction misleads the jury as to the government's burden of proof. See United States v. Veltmann, 6 F.3d 1483, 1492 (11th Cir. 1993). The Supreme Court has phrased the proper constitutional inquiry as "whether there is reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the Winship standard." Victor, __ U.S. at __, 114 S. Ct. at 1243.

Id. at 1542. In Harvell, the petitioner argued that the instruction given equated reasonable doubt with "actual and substantial doubt" and "moral certainty." Id. We held that when viewed in the context of the remainder of the jury charge, the trial court's references to "actual and substantial doubt" and "moral certainly" were eradicated and "did not create a reasonable likelihood that the jury understood the instruction to allow conviction based on proof insufficient to meet the Winship standard." Id. at 1545.

In Cage, the Supreme Court addressed three phrases that it deemed to have tainted the charge: "grave uncertainty," "actual substantial doubt," and "moral certainty." 498 U.S. at 41, 111 S. Ct. at 329. In Harvell, we addressed two potentially problematic phrases. Harvell, 58 F.3d at 1543. Here, Felker can only point to one phrase, used twice in the jury charge, that he argues constitutes a constitutional defect, i.e., the use of the term "moral certainty."

The Harvell charge made the following references to "moral certainty":

> Let's don't forget the central issue that we are here about: Are you convinced--and I will talk about the measure of proof in just a moment, beyond a reasonable doubt and to a moral certainty that the State has proven Roy Avon Harvell intentionally, that is purposely, shot and killed Mr. Midgett or shot him for the purpose of killing him.
>
> * * * *
>
> So, the State, again, has to prove guilt beyond a reasonable doubt or to a moral certainty in order to overcome the presumption of innocence.
>
> * * * *
>
> The State is not required to convince you of Mr. Harvell's guilty beyond a reasonable doubt and to the point that you could not possibly be mistaken, but simply beyond all reasonable doubt and to a moral certainty.

Id. at 1545, 1546.

The jury charge in Felker's case made the following references to "moral certainty":

> In a criminal case, however, the state must prove each of its contentions beyond a reasonable doubt and to a moral certainty.
>
> The law does not require the defendant to prove that he is innocent. His innocence is conclusively presumed until the contrary is established by the evidence beyond a reasonable doubt. The state, however, is not required to prove his guilt beyond all doubt. Moral and reasonable certainty is all that can be expected in a legal investigation.

App. A at 1102 (emphasis added). In Felker's case, as in Harvell, any potential constitutional harm caused by these references to "moral certainty" were eradicated by the language in the rest of the charge, which grounded the definition of reasonable doubt in the evidence. Harvell, 58 F.3d at 1543-44; see also Victor, ___ U.S. at __, 114 S. Ct. at 1248.

In Victor, the Court found that the trial court's reference in the charge to "an abiding conviction ... of the guilt of the accused" did "much to alleviate any concerns that the phrase moral certainty might be misunderstood in the abstract." Victor, ___ U.S. at __, 114 S. Ct. at 1249, 1250. In Harvell, the trial court instructed the jury that reasonable doubt had to be derived from the evidence and that reasonable doubt could not be "fanciful, vague, whimsical, capricious, conjectural or speculative." Harvell, 58 F.3d at 1543. Likewise, in this case, the trial court's definition of reasonable doubt as "doubt which is based on the evidence, a lack of evidence or a conflict in the evidence" and "doubt which is reasonably entertained as opposed to vague or fanciful or farfetched doubt," served to erase any taint created by the term "moral certainty" and to thus place it beyond the potential for constitutional harm. App. A at 1102. "The instruction thus explicitly told the jurors that their conclusion had to be based on the evidence in the case." Victor, ___ U.S. at __, 114 S. Ct. at 1248. "Accordingly, there is no reasonable likelihood that the jury would have understood moral certainty to be disassociated from the evidence in the case." Id. In sum, the combination of the defining phraseology set out above, together with the remainder of the charge, which included other explanations and qualifications of the term "reasonable doubt,"[5] "convinces us

[5]"If after you consider all the facts and circumstances in the case your minds are wavering, unsettled and unsatisfied, then that is the doubt of the law, and you should acquit the defendant." App. A at 1103. "No conviction should rest upon suspicion, conjecture or the possibility of guilt." Id. at 1105-06.

that it was not reasonably likely that the jury understood the instructions to allow conviction based upon proof insufficient to meet the Winship standard." Harvell, 58 F.3d at 1545 (emphasis added).

In addition to contending that the trial court's charge to the jury violated his due process right under Cage, Felker also argues that the prosecutor's remarks to individual jurors during voir dire regarding the state's burden of proof implicate the same concern as that addressed by the Supreme Court in Cage. Felker correctly points out that, during voir dire, the prosecutor explained to several jurors that "moral and reasonable certainty is all that is required in a legal investigation." See, e.g., (R. 215, 265, 314, 393, 587, 629).

The purpose of voir dire examination is to allow the government and the defendant to evaluate and select an impartial jury capable of fairly deciding the issues presented by applying the law as instructed by the court to the facts as produced during the trial. United States v. Miller, 758 F.2d 570, 571 (11th Cir.) (emphasis added), cert. denied, 474 U.S. 994, 106 S. Ct. 406, 88 L. Ed. 2d 357 (1985). (emphasis added). We note that, immediately following voir dire, the court explicitly instructed the impanelled jurors that "[a]rguments by counsel are not evidence, and you are not bound by them." (R. 4). In light of our conclusion that the

"[B]efore you would be authorized to convict on evidence which is entirely circumstantial, such evidence must not only prove the guilt of the accused beyond ever reasonable doubt, but it must also exclude every other reasonable theory except that of guilt." Id. at 1105.

trial court's jury charge, viewed in its entirety, appropriately instructed the jury with respect to its responsibility to find the defendant guilty beyond a reasonable doubt, and therefore did not violate Felker's due process right pursuant to Cage, we find that the prosecutor's remarks during voir dire to which Felker now objects were adequately rectified by the jury charge and the timely admonition to the jury discussed above, and did not taint the trial or the verdict.

Therefore, we conclude that even if Felker's claim under Cage was not barred under pre-Act second or successive petition law, he could not prevail on its merits because the trial court's references to "moral certainty," when viewed in context, as well as the admonition of the trial judge to the jury relative to the arguments of counsel, the entire charge, and the proximity of the charge to the jury's deliberation, did not create a reasonable likelihood that the jury was misled as to the proper burden of proof or encouraged to arrive at its verdict by applying a standard of proof lower than reasonable doubt.

B. Felker's Claim that Permitting a Non-Physician Medical Examiner to Testify to the Time of Death Violated Due Process and the Eighth Amendment

Felker offers no cause for his failure to raise in his first federal habeas petition the claim that it was constitutional error to permit Warren Tillman, a non-physician medical examiner, to give his opinion concerning the time of the victim's death. Medical Examiner Tillman's qualifications, or lack thereof, were fully developed during direct and cross-examination at trial. Accordingly, the claim that Felker belatedly seeks to raise concerning that matter has been fully available to him since the trial in 1983. Felker does not proffer any other cause for his failure to raise this claim in his first federal habeas proceeding in 1993.

Turning to the fundamental miscarriage of justice exception to the cause and prejudice requirement, Felker has not shown that it is more likely than not that no reasonable juror would have convicted him but for the alleged constitutional error of permitting Tillman to offer an opinion as to the time of death. Tillman testified that in his opinion the victim could have been killed as many as fourteen days prior to her body being discovered on December 8, 1981, which would mean that she could have been killed as early as November 24, 1981, the date she was last seen alive. Felker had an alibi from 7:00 p.m. November 25, 1981 forward. He contends that Tillman's testimony was critical to his conviction, because he argues, "[t]he only evidence that the death occurred when [Felker] could have caused it was the 'expert'

testimony of a non-physician [Tillman] employed by the prosecution arm of the State of Georgia." Application at 30-31. That simply is not true. Dr. James Q. Whitaker, a highly qualified pathologist and medical examiner (R. 428-30) also examined the pertinent evidence including photographs, the body itself after it was disinterred, tissue slides, and so forth, and he reached his own opinion concerning the time of death. The Georgia Supreme Court summarized Dr. Whitaker's testimony as follows:

> Dr. Whitaker, the medical examiner for Houston County, testified for the state in rebuttal. His early experience was in Baltimore, Maryland, and, perhaps due to the proximity of Chesapeake Bay, he had observed over "200 drowning or immersion-type cases." Dr. Whitaker testified that--considering the air temperatures in the relevant time period; the fact that most missing and murdered persons die soon after they disappear; the fact that when Joy Ludlam was found, she was wearing the same clothes as when she was last seen alive; and the extent of decomposition--in his opinion, death occurred two weeks prior to the discovery of the body.

Felker v. State, 252 Ga. at 359, 314 So.2d at 631. We have reviewed Dr. Whitaker's testimony at trial, and he did testify that: "I would say most — in my opinion, the time of death is shortly after she became missing, and in my opinion it's more likely, with a reasonable degree of medical probability, that the death occurred 14 days ago when she was missing, found missing, but certainly, with the degree of decomposition that is present, three to five days, within that time frame is possible, but I think that the time, in my opinion, is older than that." (R. 997-98).

There is no question that Dr. Whitaker is a qualified pathologist. He is a medical doctor, having pursued a study in the specialty of pathology, including an internship and residency in pathology, and he is a board certified anatomic and clinical pathologist. He had taught forensic pathology, and at the time of trial was the Chief Pathologist and Director of Laboratories and Clinical Pathology at the Houston County Hospital, in Warner Robbins, Georgia (R. 428). At the time of his trial testimony, Dr. Whitaker had performed over 1500 autopsies (R. 430).

Moreover, there was other evidence, in addition to Dr. Whitaker's expert opinion, that the victim's death occurred fourteen days before her body was discovered, making it likely that she was killed around November 24, 1981. It was undisputed that the victim's car was seen parked in an local bank parking lot on the evening of November 24, and the next morning her car was still parked there, apparently abandoned. There was also evidence that she had placed a call to her employer during the early evening of November 24, stating that she would not be working that evening. Felker admitted to an officer that the victim had made that telephone call from his home. When her body was discovered two weeks after she disappeared, it was clothed in the same dress she had been wearing when last seen on November 24. When that evidence is combined with other evidence of Felker's guilt, including the remarkable similarities between this crime and a similar crime he had committed and been convicted for earlier, see Felker v. Thomas, 52 F.3d at 908, we readily conclude that Felker has not shown that

but for the alleged constitutional violation of permitting Warren Tillman to offer his opinion as to the time of death, it is more likely than not that no reasonable juror would have convicted him.

Although pre-Act law certainly did not restrict the second and successive petition bar only to claims that lacked merit, we do note, for the sake of completeness, that this claim lacks merit. As we have pointed out previously, this claim is based upon the false premise that Warren Tillman was the only expert witness who testified to an opinion consistent with the victim having been killed at a time for which Felker did not have an alibi. But the record clearly shows that Dr. Whitaker, who was unquestionably qualified to give such an opinion, also testified to the same opinion as Tillman. In addition to the expert testimony, there was other evidence, which we have already discussed, establishing that the victim died as early as November 24, 1981. The standard of review for state evidentiary rulings in federal habeas corpus proceedings is a narrow one. Only when evidentiary errors "so infused the trial with unfairness as to deny due process of law" is habeas relief warranted. Lisenba v. California, 314 U.S. 219, 228, 62 S. Ct. 280, 286 (1941), quoted and applied in, Estelle v. McGuire, 502 U.S. 62, 75, 112 S. Ct. 475, 484 (1991); accord Baxter v. Thomas, 45 F.3d 1501, 1509 (11th Cir.) (evidentiary ruling claims reviewed only to determine whether the error "was of such magnitude as to deny fundamental fairness"), cert. denied, 116 S. Ct. 385 (1995); Kight v. Singletary, 50 F.3d 1539, 1546 (11th Cir. 1995), cert. denied, 116 S. Ct. 785 (1996). Such a determination

is to be made in light of the evidence as a whole. Viewing the evidence in this case in its entirety, the introduction of Warren Tillman's testimony did not so infuse the trial with unfairness as to deny Felker fundamental fairness and due process of law.

C. Actual Innocence as an Independent Constitutional Claim

Thus far we have discussed actual innocence only in the Schlup v. Delo "gateway" procedural, as distinguished from independent substantive, sense. See 115 S. Ct. at 860-61. Although not entirely clear, it appears from his application that Felker also may be seeking to either litigate actual innocence as a separate constitutional claim, or at least be seeking to challenge the Act as unconstitutional on the grounds that it precludes assertion of a separate and independent constitutional claim of actual innocence. More likely the latter. In regard to that possibility, the State has responded that the Act does not modify the law involving actual innocence claims. We need not decide whether the Act precludes such claims, because even if it did, that modification of the law would not affect Felker who does not have a valid actual innocence claim, anyway.

Justice O'Connor joined by Justice Kennedy, both of whose votes were necessary to the majority in Herrera v. Collins, 506 U.S. 390, 113 S. Ct. 853 (1993), explained that that decision left open the difficult question of whether federal habeas courts may entertain convincing claims of actual innocence. Id. at 472, 113 S. Ct. at 874. Justice O'Connor characterized the Herrera decision

as assuming "for the sake of argument that a truly persuasive demonstration of actual innocence would render any such execution unconstitutional and that federal habeas relief would be warranted if no state avenue were open to process the claim." Id. Making that same assumption, Felker is not entitled to habeas relief for two reasons. First, the Herrera opinion itself noted that, unlike Texas, Georgia is a state that not only permits motions for new trial on newly discovered evidence grounds, but it also provides that the time for filing such motions can be extended. Id. at 411 n.11, 113 S. Ct. at 866 n.11; Ga. Code Ann. §§ 5-5-40 and 5-5-41 (Michie 1995).[6] Therefore, this is not a case where there is "no state avenue ... open to process the claim." Id. at 472, 113 S. Ct. at 874.

Second, Felker has failed to persuasively demonstrate his actual innocence. Justice O'Connor's characterization of the habeas petitioner in Herrera is equally applicable to Felker:

> He was tried before a jury of his peers, with the full panoply of protections that our Constitution affords criminal defendants. At the conclusion of that trial, the jury found petitioner guilty beyond a reasonable doubt. Petitioner therefore does not appear before us as an innocent man on the verge of execution.

[6]At the time of Felker's conviction and sentencing in February 1983, Georgia law allowed defendants to move for a new trial on the basis of newly discovered evidence. See Dick v. State, 287 S.E.2d 11, 13 (1982). While Georgia law generally requires motions for a new trial to be made within 30 days of entry of judgment, see Ga. Code Ann. § 5-5-40 (Michie 1995), it also permits "extraordinary" motions to be filed after this deadline, see Ga. Code Ann. § 5-5-41 (Michie 1995). This was also true back in 1983 at the time of Felker's conviction and sentence in Houston County Superior Court. See Dick, 287 S.E.2d at 13 & n.2.

> He is instead a legally guilty one who, refusing to accept the jury's verdict, demands a hearing in which to have his culpability determined once again.

Id. at 419-20, 113 S. Ct. at 870. The only evidence Felker offers that was not offered at his trial are the affidavits of two medical examiners who criticize the qualifications of Medical Examiner Tillman and disagree with his opinion about the time of death. Neither of Felker's new experts impugn in any way the qualifications of Dr. James Whitaker, another medical examiner, who testified to the same opinion about the time of death as did Tillman. At most, the belated affidavits are cumulative evidence in support of Felker's position on the time of death issue. There was expert opinion testimony on both sides of that issue at trial, as well as other evidence. Considering it all, we do not doubt in the least Felker's guilt.

Moreover, permitting such last minute affidavits to reopen guilt issues, absent truly extraordinary circumstances which are not present here, would open up virtually any capital case in which expert testimony was presented on behalf of the State to relitigation on the eve of execution. We do not believe that the Constitution or anything in the Herrera decision requires that, particularly where, as here, we are convinced that, "[p]etitioner is not innocent, in any sense of the word." Id. at 419, 113 S. Ct. at 870 (concurring opinion of O'Connor, J., joined by Kennedy, J.).

III. CONCLUSION

Felker has failed to show substantial grounds upon which

relief might be granted under the new Act. Likewise, he has failed to show substantial grounds upon which relief might be granted insofar as any constitutional issues involving the Act are concerned, because he would not be entitled to any relief even under pre-Act law.

The request for a stay of execution is DENIED.

The application for an order authorizing the filing of a second or successive petition is DENIED.

THE STATE OF GEORGIA	)	Indictment No. 12405
vs.	)	Murder, Agg. Sodomy, Rape, et al
ELLIS WAYNE FELKER	)	CHARGE OF THE COURT

Members of the jury, on May 17, 1982, the grand jury of this circuit indicted the defendant, Ellis Wayne Felker, and charged him with the offenses of rape, aggravated sodomy, false imprisonment, robbery and murder.

To that indictment, and to those charges, Mr. Felker has entered his plea of not guilty, thereby denying and challenging each and every essential allegation in the indictment.

As I previously mentioned to you, the robbery charge is no longer before you because as a matter of law such charge was not proved, and the instructions which I will now give you will apply to each remaining charge in the indictment, unless I state otherwise.

Whether the other charges in the indictment have been proven is for you to decide based on the evidence on the instructions I will now give you.

The indictment, along with the defendant's plea of not guilty, will be out with you when you consider the case, and you may refer to them. They are not evidence, however, and you should not consider them as such. They simply represent the method by which the case was brought into court for trial.

In spite of his indictment, the defendant is presumed to be innocent until his guilt is established by the evidence to the exclusion of and beyond every reasonable doubt. The burden of proof in this case, as in all criminal cases, rests upon the state, from the beginning to the end of the trial, to establish beyond a reasonable doubt every fact essential to the conviction of the defendant. That is, the state must prove beyond a reasonable doubt that a crime was in fact committed and that the defendant was the person who committed the crime.

The standard of proof in a criminal case is higher than that required in a civil case. In civil cases, a simple preponderance or greater weight of the evidence is considered sufficient to sustain a contention. In a criminal case, however, the state must prove each of its contentions beyond a reasonable doubt and to a moral certainty.

The law does not require the defendant to prove that he is innocent. His innocence is conclusively presumed until the contrary is established by the evidence beyond a reasonable doubt. The state, however, is not required to prove his guilt beyond all doubt. Moral and reasonable certainty is all that can be expected in a legal investigation.

A reasonable doubt is defined as a doubt which is based on the evidence, a lack of evidence or a conflict in the evidence. It is a doubt which is reasonably entertained as opposed to a vague or fanciful or farfetched doubt.

If after you consider all the facts and circumstances in the case your minds are wavering, unsettled and unsatisfied, then that is the doubt of the law, and you should acquit the defendant. On the other hand, if such doubt does not exist in your minds as to his guilt, you should convict him.

One of the elements in every criminal case is the matter of venue; that is, the state must prove that the crime occurred in the county in which the case is being tried. For example, if a crime occurs in Houston County, then the trial for that crime shall be in Houston County.

In a murder case, the trial may be held in the county where the cause of death was inflicted or in the county where death actually occurred, if it cannot be determined where the cause of death occurred.

The defendant in this case contends that the state has not proved the element of venue. In that respect I instruct you that it is the state's burden, with respect to each charge in the indictment, to prove beyond a reasonable doubt that the crime might have been committed in Houston County. If the state fails to do this, then the defendant is entitled to a verdict of not guilty.

You are the sole judges of the credibility of the witnesses and of the weight to be given their testmiony. In deciding the credit to be given any witness' testimony, you may take into account his or her ability and opportunity to observe the facts; his or her memory; the witness' manner

---

while testifying; any interest, bias or prejudice the witness may have, and you may also consider the reasonableness of such testimony.

If there are conflicts in the evidence, it is your duty under the law to reconcile them wherever possible so as to make all the witnesses speak the truth and not attribute a false statement to any of them. If you cannot do this, however, then you would believe that testimony which is most reasonable and credible to you.

A witness' testimony may be impeached or discredited by disproving the facts testified to by him or her, or by showing that the witness made a previous statement or statements inconsistent with or contradictory to the testimony given at trial.

If you determine that the testimony of any witness has been impeached or discredited in that manner, you are authorized to believe or disbelieve said witness' testimony in whole or in part.

If you find that any witness has been placed under hypnosis for the purpose of refreshing or improving that witness' recollection, and if you find that such testimony is in whole or in part induced by the hypnosis, then to the extent that it was you would disregard such testimony.

Ordinarily the court receives the testimony of witnesses only as to facts to which the witness has particular and direct knowledge. In certain cases, however, where a particular degree of skill or knowledge is required to understand the situation, the law receives the opinion of those deemed to be expert in certain lines. The opinion testimony of an expert can be based on hypothetical questions or based on the expert's observations. You should not consider any opinion at all unless the facts upon which it is based are found by you to be true.

Even though you are permitted to receive the testimony of an expert, you are not bound by such testimony. The law allows you to receive it and consider it, along with all the other evidence in the case.

Evidence is either direct or circumstantial. Direct evidence is that which itself speaks to the issue involved. Indirect or circumstantial evidence is that which by its consistency suggests or implies that a certain claim or theory is true.

Criminal conduct may be proved by circumstantial evidence as well as by direct evidence. However, before you would be authorized to convict on evidence which is entirely circumstantial, such evidence must not only prove the guilt of the accused beyond every reasonable doubt, but it must also exclude every other reasonable theory except that of guilt.

In other words, if the circumstances in the case are subject to equally reasonable constructions, one indicating guilt and the other innocence, you are obligated under the law to accept that construction indicating innocence.

No conviction should rest upon suspicion, conjecture

or the possibity of guilt.

A crime is defined as a violation of a statute of this state in which shall be a union of joint operation of act and intention. Criminal intent is a necessary element of a crime, and the state must prove such intent, just as it must prove every other essential element of the crime.

No person should be found guilty of any crime which is committed by misfortune or accident, where it satisfactorily appears there was no criminal intention.

No one is presumed to act with criminal intention, but you may find such upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the offense. You may likewise find a lack of criminal intent upon such a consideration.

Every person is presumed to be of sound mind and discretion and is presumed to intend the natural and probable consequences of his acts. The acts of such a person are presumed to be intentional. These presumptions may be rebutted by any evidence to the contrary.

In this case, the state has contended that the defendant was involved in a similar offense in 1976, and evidence was offered concerning the 1976 occurrence. The court allowed that evidence solely for you to decide whether it might tend to illustrate the defendant's motive, intent or state of mind with respect to the charges for which is is now on trial, and for no other purpose.

Whether the defendant in fact committed such other

offense, and if so, whether it illustrates his state of mind in this case, is a matter for you to decide.

In order for any crime to have been committed upon the person of the victim in this case, you must find beyond a reasonable doubt that such crime, if any, was committed upon her before she died.

In count one of the indictment, the defendant is charged with the offense of rape. A person commits rape when he has carnal knowledge of a female forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration, however slight, of the female sex organ by the male sex organ. For such carnal knowledge to constitute the offense of rape, the penetration must have been accomplished by force and against the will and without the consent of the female alleged to have been raped. The offense of rape is not complete if the element of force is lacking in the commission of the sexual act.

In count two of the indictment, the defendant is charged with the offense of aggravated sodomy. A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the anus of another. A person commits the offense of aggravated sodomy when he commits sodomy with force and against the will of the other person.

In this case, the state must prove beyond a reasonable doubt that the defendant inserted his sex organ into the anus of Evelyn Joy Ludlam with force and against her will

in order for there to be a conviction under this count.

In count three of the indictment, the defendant is accused of the offense of false imprisonment. A person commits the offense of false imprisonment when, in violation of the personal liberty of another, he detains such person without legal authority.

In count five of the indictment, the defendant is charged with the offense of murder. A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention to kill which is manifested or shown by external circumstances capable of proof.

Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart. Malice is an essential element of murder, and it must exist before any homicide can be murder. Malice in its legal sense is not necessarily ill will or hatred. It is the unlawful, deliberate, preconceived intention to kill a human being without justification or excuse, which intention must exist at the time of the killing. If such intention enters the mind of the slayer a moment before he commits the fatal act, that is sufficient.

Members of the jury, you should take the instructions which I have given you in this case and apply them to the facts as you find the facts to be, and arrive at a verdict which speaks the truth. The object of every legal investigation is the discovery of the truth. You are not concerned with the effect or consequence of your verdict. You are only concerned that the speak the truth.

As to each count in the indictment, the four remaining counts, members of the jury, if you believe beyond a reasonable doubt that the defendant is guilty as charged in the indictment, it would be your duty to convict him, and the form of your verdict in that event would be, "We find the defendant guilty."

On the other hand, if you do not believe that the defendant has committed the offenses with which he's charged or any one of them dealing with each particular count, or if you entertain a reasonable doubt as to the defendant's guilt, it would be your duty to acquit him, and in that event the form of your verdict would be, "We find the defendant not guilty."

Whatever your verdict is, members of the jury, one of you as foreperson of the jury should write it out separately as to each count on the back of the indictment. You should then date it and sign it. Then you would notify the bailiff that you have arrived at your verdict, and you will be asked to come back into the courtroom so that your verdict can be published as provided by law.

I ask at this time, please, that the 12 of you on the regular jury panel retire to this jury room. I'm going to ask the two alternates for the time being to retire back ho

I believe, to my office. Any objection to that, for the time being? All right.

(The jury thereupon left the courtroom at 2:28 p.m.)

* * *

THE COURT: Does the state have any exceptions to the charge?

MR. FINLAYSON: No, sir, your Honor.

THE COURT: Do you at this time, Mr. Hasty or Mr. Brown?

MR. BROWN: Judge, the only thing that, other than failure to give our requests to charge, that I would make exception to is the judge charged, like a lot of courts do, that the jury must make the witnesses speak the truth; that coupled with the fact that the judge charged the jury that they have a duty to convict if they find that there's not reasonable doubt, I think the combination there would tell the jury they have to believe somebody that they may otherwise decide to disregard entirely, whether or not the person has been impeached.

I think one privilege the jury would have would be to simply disregard somebody's testimony without that person being impeached, and the judge's charge does not give them that option. I would point that out now, but, of course, we don't waive the various other requests. I don't have a list of all of the requests that were not given at this time I don't recall one on the wavering mind, if the jury

were to say that --

MR. HASTY: Yeah.

MR. BROWN: Was that given? We would reserve our right to any further objection.

THE COURT: I think you may reserve your exceptions. I don't think under the present law you are required to go into any detail as to any problems with the charge; and, as I said, now, we will get a copy of your requests, along with those of the state, marked filed.

Now, do you want to get together and get the evidence to go to the jury?

(The exhibits were thereupon gathered by counsel and the reporter.)

(The exhibits were taken to the jury at 2:43 p.m.)

Now, let me tell you what I have in mind doing with respect to the two alternates, is to continue sequestering them until such time as this jury reaches a verdict.

Now, my impression is that they can be called on to serve in connection with this case up until that time. Once this jury decides the verdict, I think their services are over, even if the jury convicts the defendant. I question whether they would be permitted to serve in an alternate capacity in the sentence phase not having participated in the guilt or innocence. I don't think they could.

MR. DANIEL: The law says the same jury shall consider the penalty as considered the first . . .

(3)

No. 95-8836 (A-890)

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

In Re ELLIS WAYNE FELKER

RESPONSE IN OPPOSITION TO MOTION FOR STAY OF EXECUTION

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No._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

In Re ELLIS WAYNE FELKER

RESPONSE IN OPPOSITION TO MOTION FOR STAY OF EXECUTION

I.

STATEMENT OF THE CASE

Petitioner, Ellis Wayne Felker, was indicted on May 17, 1982 in the Superior Court of Houston County, Georgia for the murder, rape, aggravated sodomy, false imprisonment and robbery of Evelyn Joy Ludlam. Following the close of the evidence at the guilt-innocence phase of trial, a directed verdict was granted as to the robbery charge. Petitioner was found guilty of the remaining charges and received a life sentence for rape,

a twenty year sentence for aggravated sodomy (to be served consecutively to the rape sentence) and a ten year sentence for the offense of false imprisonment, to run concurrently with the sentence imposed for rape. At the sentencing phase, the jury found the existence of two statutory aggravating circumstances, i.e., that the offense of murder was committed while the offender was engaged in another capital felony, to wit: rape; and that the offense was outrageously or wantonly, vile, horrible or inhuman in that it involved torture or depravity of mind. See O.C.G.A. § 17-10-30-(b)(2) and (b)(7). Petitioner's amended motion for new trial was denied on July 20, 1983.

Petitioner appealed to the Supreme Court of Georgia which affirmed his convictions and sentences in Felker v. State, 252 Ga. 351, 314 S.E.2d 621 (1984). Petitioner's motion for rehearing was denied on March 29, 1984. Petitioner's petition for a writ of certiorari filed in this Court was denied on October 1, 1984.

Petitioner then filed a petition for a writ of habeas corpus on December 17, 1984. (Respondent's Exhibit 1). Proceedings were held on March 25, 1985, March 3, 1986, March 30, 1987 and July 16, 1990. The court denied Petitioner relief on August 9, 1990. Petitioner's application for a certificate of probable cause to appeal from the denial of state habeas corpus relief was denied on September 3, 1991. Petitioner then filed a petition for a writ of certiorari in this Court on

November 1, 1991. The petition for a writ of certiorari was denied on January 21, 1992.

On April 12, 1993, Petitioner served by mail on counsel for Respondent, an application for federal habeas corpus relief to be filed in the United States District Court for the Middle District of Georgia. The district court subsequently allowed the application to be filed and it was stamped filed as of June 2, 1993. On June 9, 1993, the district court entered an order directing the Petitioner to amend his petition within thirty days "to include every alleged possible constitutional error or deprivation entitling petitioner to habeas relief in this court, failing which Petitioner will be presumed to have deliberately waived his right to complain of any constitutional errors or deprivations other than those set forth in his habeas petition." (Respondent's Appendix 1).

On January 26, 1994, the district court denied Petitioner federal habeas corpus relief. Petitioner filed a notice of appeal on February 23, 1994. The district court granted Petitioner's application for a certificate of probable cause to appeal on February 25, 1994.

Petitioner appealed the denial of federal habeas corpus relief to the United States Court of Appeals for the Eleventh Circuit. Following oral argument, the Circuit Court affirmed the denial of federal habeas corpus relief in Felker v. Thomas, 52 F.3d. 907 (11th Cir. 1995). On Petitioner's petition for a

rehearing and suggestion of rehearing en banc, the Eleventh Circuit addressed Petitioner's contentions, but extended the original panel opinion in Felker v. Thomas, 62 F.3d. 342 (11th Cir. 1995). Petitioner then filed a petition for a writ of certiorari in this Court seeking review of the two opinions of the Eleventh Circuit. Certiorari was denied on February 20, 1996 and Petitioner's petition for rehearing was denied on April 15, 1996.

Petitioner's execution period was set for May 2, 1996 through May 9, 1996. On April 29, 1996, Petitioner filed a motion for access to conduct a mental health evaluation of Petitioner and a petition for state habeas corpus relief in the Superior Court of Butts County. Respondent filed a motion to dismiss this petition as successive and for failure to state a claim as to certain issues.

On April 30, 1996, Petitioner filed an amended petition for a writ of habeas corpus and Respondent filed an amended motion to dismiss the petition as successive under state law on May 1, 1996, prior to the hearing previously scheduled by the court in connection with Respondent's motion to dismiss. Following the hearing conducted on May 1, 1996, the state habeas corpus court found the Cage issue to be without merit and the remaining issues to be successive and subject to dismissal under Georgia's successive petition rule. On May 2, 1996, the Supreme Court of Georgia denied Petitioner's application for a

certificate of probable cause to appeal and denied Petitioner's motion for stay of execution.

Petitioner lodged in the Eleventh Circuit on May 1, 1996. an "Application for Permission to File a Second Habeas Corpus petition in the district court and for Stay of Execution." The Respondent Warden in that action lodged a response on May 1, 1996.

REASONS FOR NOT GRANTING A STAY OF EXECUTION

Comes now, State of Georgia, through Michael J. Bowers, Attorney General for the State of Georgia in response to what has been styled as an original, but successive, application for a writ of habeas corpus filed in this Court and shows and states the following:

In a blatant attempt to circumvent the new habeas corpus rules, Petitioner has filed an original application for federal habeas corpus relief in this Court. No stay of execution should be granted to review this application. First, insofar as this Court may construe this action as an attempt to seek review of the decision of the Eleventh Circuit applying the new AntiTerrorism and Effective Death Penalty Act of 1996, this action would have to be construed as in actuality consisting of a petition for a writ of certiorari. Under the new habeas corpus rules contained in the Act, petitions for rehearing or certiorari are prohibited from a decision of a circuit court of appeals denying authorization to an applicant to file a second or successive application. See Section 106. The Eleventh Circuit has declined to authorize the filing of a successive petition in the district court. That decision is not reviewable and therefore, no stay of execution should be granted for that purpose.

Despite his inclusion of two claims in this application which purportedly challenge the state court judgment in question, Petitioner's real purpose is to challenge the constitutionality of the new rules which he has admitted apply to his successive application for federal habeas corpus relief. This Court should not allow itself to be used to thwart the new statutory scheme designed to expedite the consideration of, particularly successive, applications.

Despite what labels may be attached under the old or new statutory schemes to Petitioner's conduct, Petitioner is seeking to stay his execution based on two issues which Petitioner could have been raised three years ago when filing his first federal petition. No stay of execution is authorized to allow Petitioner's claims in this successive petition to be reviewed.

In opposing the granting of the stay of execution, Respondent maintains his position that the new rules are constitutional, that Petitioner is not authorized to have his successive application reviewed, and further, that if reviewed, there is no reasonable likelihood of his success on the merits of the claims being raised.

Should this Court desire further response on any issue or on the "petition for writ of habeas corpus," Respondent will submit one on request.

CONCLUSION

Wherefore, for all of the above and foregoing reasons, Respondent prays that this Court deny Petitioner's request for a stay of execution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing Response, by facsimile upon:

M. Elizabeth Wells
Stephen C. Bayliss

This 2nd day of May, 1996.

SUSAN V. BOLEYN
Senior Assistant
Attorney General

No. 95-8836

In The

Supreme Court of the United States

October Term, 1995

ELLIS WAYNE FELKER,

Petitioner,

v.

TONY TURPIN, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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Petition For Certiorari Filed May 2, 1996
Certiorari Granted May 3, 1996

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES AND OTHER RELEVANT MATTERS

May 1, 1996 — Petitioner's *Application for Permission to File a Second Habeas Corpus Petition in the District Court, and for Stay of Execution* lodged in the United States Court of Appeals for the Eleventh Circuit, along with a letter from counsel for Petitioner explaining that the Application was being lodged prior to the conclusion of state court proceedings because of the confusion that might be engendered by the one-week old Antiterrorism Act.

May 1, 1996 — Respondent's *Response to Application for Permission to File a Second Habeas Corpus Petition in the District Court, and for a Stay of Execution* lodged in the United States Court of Appeals for the Eleventh Circuit.

May 2, 1996 — Petitioner's *Application for Permission to File a Second Habeas Corpus Petition in the District Court, and for Stay of Execution (Corrected)* lodged in the United States Court of Appeals for the Eleventh Circuit, along with a letter from counsel for Petitioner regarding the corrections.

May 2, 1996 — Petitioner's *Reply to State's Response to Application for Permission to File a Second Habeas Corpus Petition in the District Court, and for Stay of Execution* filed in the United States Court of Appeals for the Eleventh Circuit.

May 2, 1996	Respondent's *Reply Brief In Response to Application* filed in the United States Court of Appeals for the Eleventh Circuit.
May 2, 1996	Petitioner's *Petition for Writ of Habeas Corpus, For Appellate or Certiorari Review of the Decision Of the United States Circuit Court, and for Stay of Execution* lodged in the United States Supreme Court.
May 2, 1996	Panel of the United States Court of Appeals for the Eleventh Circuit issued opinion denying application for leave to file successive habeas corpus petition.
May 2, 1996	Respondent's *Response in Opposition to Motion for Stay of Execution* filed in the United States Supreme Court.
May 2, 1996	Petitioner's *Letter* supplementing second and third questions filed in the United States Supreme Court.
May 2, 1996	Stay of Execution entered by United States Supreme Court Justice Anthony M. Kennedy.
May 3, 1996	United States Supreme Court granted application for stay of execution, motion for leave to proceed in forma pauperis, and petition for a writ of certiorari.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-1077

ELLIS WAYNE FELKER,

Petitioner,

versus

TONY TURPIN, Warden,
Georgia Diagnostic and
Classification Center,

Respondent.

On Application for Leave to File
Successive Habeas Corpus Petition

(Filed May 2, 1996)

Before BIRCH, BLACK and CARNES, Circuit Judges.

BY THE COURT:

In *Felker v. Thomas*, 52 F.3d 907 (11th Cir.), *extended on denial of rehearing*, 62 F.3d 342 (1995), *cert. denied*, 116 S. Ct. 956 (1996), we affirmed the denial of habeas corpus relief as to the murder, rape aggravated sodomy, and false imprisonment convictions, as well as the death sentence of Ellis Wayne Felker. The procedural history, evidence, and facts in the case are summarized in our prior opinions and in the Georgia Supreme Court's decision affirming his convictions and sentence on direct appeal,

Felker v. State, 252 Ga. 351, 314 S.E.2d 621, *cert. denied*, 469 U.S. 873, 105 S. Ct. 229 (1984).

On February 20, 1996, the Supreme Court denied Felker's petition for writ of certiorari seeking review of our decision denying his first federal habeas corpus petition. On April 17, 1996, the Superior Court of Houston County, Georgia, set May 2 through May 9, 1996, as the period during which Felker's execution would be carried out. On April 29, 1996, Felker filed a petition for writ of habeas corpus in the Superior Court of Butts County, Georgia. (It was his second state habeas petition; his first had been denied in 1990.) The Superior Court denied Felker's second state habeas petition on May 1, 1996, and the Georgia Supreme Court denied his petition for writ of certiorari at 11:00 a.m. ET, today.

Felker is now back before us. Yesterday afternoon, he lodged with this Court a request for a stay of execution and an application, pursuant to § 106 of the newly enacted Antiterrorism and Effective Death Penalty Act of 1996 ("the Act"), for permission to file a second federal habeas petition in the district court. He lodged a corrected application at 9:35 a.m. ET, this morning, and his application was formally filed at 11:30 a.m. ET, today.

Only last month, the Supreme Court emphasized the nonautomatic nature of stays of execution in second or successive habeas petition cases. Vacating the entry of a stay order by the Eighth Circuit in *Bowersox v. Williams*, 116 S. Ct. 1312 (1996), the Court reiterated that: "A stay of execution pending disposition of a second or successive federal habeas petition should be granted only when there are substantial grounds upon which relief might be

granted." *Id.* (citation and internal quotation marks omitted). The Supreme Court reminded us, in no uncertain terms, that: "[e]ntry of a stay on a second or third habeas petition is a drastic measure, and we have held that it is ' "particularly egregious" ' to enter a stay absent substantial grounds for relief." *Id.* (quoting *Delo v. Blair*, 509 U.S. 823, 113 S. Ct. 2922 (1993)).

Neither party in the present case contends that the standard applicable to stays of execution in second or successive petition cases has been changed by the Act.[1] Accordingly, we proceed to determine whether Felker has shown substantial grounds upon which relief might be granted, thus entitling him to the "drastic measure" of a stay of execution in this second petition case.

Felker requests that we enter a stay of execution "to allow full briefing on the many life or death issues created by the Act," which he contends violates the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments, the Supremacy Clause, and the Separation of Powers doctrine. Alternatively, he requests a stay "because the Applicant has satisfied the provisions of the Act and is entitled to a remand." (footnote omitted). We address the second alternative first.

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[1] Nothing that we say about the Act in this opinion concerns § 107, which applies special habeas corpus procedures to capital cases arising in those states that qualify under the provisions of the newly enacted 28 U.S.C. § 2261. There is no contention, yet, that the State of Georgia has shown – or even had an opportunity to show – that it qualifies to benefit from the special procedures established by § 107 of the Act. Whether it does is a question for another day.

I. FELKER'S CONTENTION THAT HE HAS SATISFIED THE PROVISIONS OF THE ACT AND IS ENTITLED TO A REMAND

Section 106 of the Act amends 28 U.S.C. § 2244(b) to read, in pertinent part:

> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.
>
> (3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for

> an order authorizing the district court to consider the application.
>
> (B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
>
> (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

Felker's application seeks an order from this Court authorizing the district court to consider a second or successive petition containing two claims. The first is a *Cage v. Louisiana*, 498 U.S. 39, 111 S. Ct. 328 (1990), claim. Felker does not, and could not, contend that this is a claim the factual predicate of which "could not have been discovered previously through the exercise of diligence," within the meaning of new § 2244(b)(2)(B), because the factual predicate of the claim has been available on the record since Felker's trial.

As for § 2244(b)(2)(A), we have held that the *Cage* rule is retroactively applicable to cases that had completed direct review before the *Cage* decision was announced. *Nutter v. White*, 39 F.3d 1154 (11th Cir. 1994). However, we cannot find that Felker's *Cage* claim was "previously unavailable" to him when he filed his first habeas petition in 1993, which was long after *Cage* was decided. Felker argues in his application that the *Cage* claim was not available to him until *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078 (1993), made it obvious that

the *Cage* rule was retroactive. Even assuming for present purposes the dubious legal premise that *Cage* was not available to Felker until the *Sullivan* decision was announced, the fact remains that *Sullivan* was decided on June 1, 1993, and Felker's first habeas petition was not formally accepted and placed on the docket until June 2, 1993.[2] And, of course, nothing would have prevented Felker from filing a motion to amend his first petition, even if the *Sullivan* decision had been released days or weeks after, instead of just before, the petition was filed. No answer was filed to the petition until August 6, 1993, and amendments to habeas petitions are freely permitted.

The other claim Felker seeks to litigate in a second or successive petition is a claim that "it violates the Eighth and Fourteenth Amendments for a non-physician, state agent to provide sole evidence upon which a jury relied to determine the critical issue of time of death." As we explain on pp. 17-19, below, this claim has no basis in the record, which contradicts it. However, even assuming for present purposes that there was some factual basis for the claim, it is not one which "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" as required by newly amended § 2244(b)(2)(A). Not only is there no new decision

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[2] Felker attempted to file his first habeas petition on April 27, 1981, but he did not pay the filing fee, and the magistrate judge denied his motion to proceed in forma pauperis. Not until Felker paid the filing fee on June 2, 1981, was the petition placed on the civil docket. On June 9, 1981, the district court judge entered an order granting Felker's motion to proceed in forma pauperis and for appointed counsel.

announcing a rule of law that has been made retroactively applicable, Felker does not cite any decisional law whatsoever in support of his proposition.

As for § 2244(b)(2)(B), Felker does not contend that the factual predicate for this claim could not have been discovered previously through the exercise of due diligence. The factual predicate, to the extent any exists, is apparent on the face of the trial record. The qualifications or lack of qualifications of Medical Examiner Warren Tillman were brought out on direct and cross-examination at the trial. There is no contention that Tillman did not testify truthfully concerning his background and qualifications. Moreover, as we explain on pp. [18-20] 17-19, below, the facts underlying this claim if proven and viewed in light of the evidence as a whole, would not be sufficient to establish by a preponderance of the evidence, much less by clear and convincing evidence, that but for the alleged constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense. Accordingly, under the new Act, Felker is not entitled to an order from this Court authorizing him to file a second or successive petition raising this claim.

II. FELKER'S CONTENTION THAT THE ACT IS UNCONSTITUTIONAL

Felker also contends that the Act violates his rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments, as well as the Supremacy Clause and the Separation of Powers doctrine. His application provides very little discussion and cites no authorities for that

proposition. However, given the time constraints facing us, we choose to analyze this claim not in the abstract, but instead in terms of whether the Act makes any difference insofar as a second or successive petition raising the claims Felker wants to litigate is concerned. *Cf. Specter Motor Company v. McLaughlin*, 323 U.S. 101, 105, 65 S. Ct. 152, 154 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."); *South Florida Free Beaches, Inc. v. City of Miami, Florida*, 734 F.2d 608, 612 (11th Cir. 1984) (declining to address whether a statute was unconstitutional, because "[a]ny resolution of this issue would not affect the outcome of the case"). If Felker is barred from litigating the claims he presents under pre-existing law, then the Act's restrictions can have no unconstitutional effect on him. *Cf. United States v. Missio*, 597 F.2d 60, 61 (5th Cir. 1979) (affirming a denial of 28 U.S.C. § 2255 relief and holding that the district court correctly declined to address an issue involving the constitutionality of prior convictions where the same sentence would have been imposed even if those convictions had not been included in the presentencing report). Stated somewhat differently, if under pre-existing law Felker's claims do not present substantial grounds upon which relief might be granted, then his claim that the Act unconstitutionally restricts his presentation of such claims does not present substantial grounds for relief, either.

Under the pre-Act law concerning second or successive petitions, Felker would not be able to litigate the merits of the claims he presents unless he was able to

establish cause and prejudice sufficient to excuse his failure to present those claims in his first petition, or failing that, unless the constitutional claims he attempts to litigate fall within the "narrow class of cases . . . implicating a fundamental miscarriage of justice." *Schlup v. Delo*, 115 S. Ct. 851, 861 (1995) (quoting *McCleskey v. Zant*, 499 U.S. 467, 494, 111 S. Ct. 1454, 1470 (1991)) (alteration in original). As it applies to claims relating to the guilt stage of a capital case, the fundamental miscarriage of justice exception to the cause and prejudice rule "requires the habeas petitioner to show that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent.' " *Id.* at 867 (quoting *Murray v. Carrier*, 477 U.S. 478, 496, 106 S. Ct. 2639, 2649-50 (1986)). The petitioner must show that absent the constitutional violation "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Id.* That is a stronger showing than is required to establish prejudice, and will be found only in a "truly 'extraordinary' " case. *Id.*

We proceed to examine each of Felker's claims under that pre-Act second or successive petition law.

A. The *Cage* Claim

Felker cannot establish, and has not proffered, any valid cause for his failure to raise the *Cage v. Louisiana*, 498 U.S. 39, 111 S. Ct. 328 (1990), claim when he filed his first petition. *Cage* was announced years before Felker filed his first petition, and *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078 (1993), was announced just before the petition was formally filed and certainly well within the

time for amending it. *See* pp. 5-6, above. Nor has Felker established the fundamental miscarriage of justice exception to the cause and prejudice requirement. He has not established that it is more likely than not that no reasonable juror would have convicted him but for the reasonable doubt jury instructions that were given in this case. Accordingly, pre-Act second or successive petition doctrine bars the *Cage* claim. It is not necessary to our application of pre-Act second or successive petition law to decide whether the claim also lacks merit. However, in the interest of completeness we also note that the claim, which can be decided based upon the trial record, does lack merit.

Felker argues that the trial court's reasonable doubt instruction violated his due process rights because the instruction allowed the jury to convict him based on less than a standard of utmost certainty.[3, 4] Felker contends that by equating proof beyond a reasonable doubt with proof "to a moral certainty" the jury was allowed to convict based on less proof than that required to convict beyond a reasonable doubt.

In *Cage*, the Supreme Court held that a jury instruction that:

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[3] The trial court's instruction is affixed to this opinion as Appendix A.

[4] We note that Felker does not challenge the "two inferences" language in the jury charge, *i.e.*, that portion of the charge in which the court stated that, "if the circumstances in the case are subject to equally reasonable constructions, one indicating guilt and the other innocence, you are obligated under the law to accept that construction indicating innocence." (R. 1105). We do not, therefore, address this possible contention.

> equated a reasonable doubt with a "grave uncertainty" and an "actual substantial doubt," and stated that what was required was a "moral certainty" that the defendant was guilty . . . suggest[ed] a higher degree of doubt than is required for acquittal under the reasonable-doubt standard. When those statements are then considered with the reference to "moral certainty," rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

498 U.S. at 41, 111 S. Ct. at 329-30. The Supreme Court clarified its holding in *Cage* in *Victor v. Nebraska* and its companion case, *Sandoval v. California*, ___ U.S. ___, 114 S. Ct. 1239 (1994). There the Court held that although no particular words are required to define reasonable doubt, the trial court must correctly explain the standard in articulating the prosecution's burden of proof. *Id.* at ___, 114 S. Ct. at 1243.

We described our method of review of a reasonable doubt charge in *Harvell v. Nagle*, 58 F.3d 1541 (11th Cir. 1995), *petition for cert. filed*, ___ U.S.L.W. ___ (Jan. 17, 1996) (No. 95-8450):

> When reviewing reasonable-doubt charges, we consider the instruction as a whole to determine if the instruction misleads the jury as to the government's burden of proof. *See United States v. Veltmann*, 6 F.3d 1483, 1492 (11th Cir. 1993). The Supreme Court has phrased the proper constitutional inquiry as "whether there is reasonable likelihood that the jury understood the instructions to allow conviction based on

> proof insufficient to meet the *Winship* standard." *Victor*, ___ U.S. at ___, 114 S. Ct. at 1243.

Id. at 1542. In *Harvell*, the petitioner argued that the instruction given equated reasonable doubt with "actual and substantial doubt" and "moral certainty." *Id.* We held that when viewed in the context of the remainder of the jury charge, the trial court's references to "actual and substantial doubt" and "moral certainly" were eradicated and "did not create a reasonable likelihood that the jury understood the instruction to allow conviction based on proof insufficient to meet the *Winship* standard." *Id.* at 1545.

In *Cage*, the Supreme Court addressed three phrases that it deemed to have tainted the charge: "grave uncertainty," "actual substantial doubt," and "moral certainty." 498 U.S. at 41, 111 S. Ct. at 329. In *Harvell*, we addressed two potentially problematic phrases. *Harvell*, 58 F.3d at 1543. Here, Felker can only point to one phrase, used twice in the jury charge, that he argues constitutes a constitutional defect, *i.e.*, the use of the term "moral certainty."

The *Harvell* charge made the following references to "moral certainty":

> Let's don't forget the central issue that we are here about: Are you convinced – and I will talk about the measure of proof in just a moment, *beyond a reasonable doubt and to a moral certainty* that the State has proven Roy Avon Harvell intentionally, that is purposely, shot and killed Mr. Midgett or shot him for the purpose of killing him.

> • • •
>
> So, the State, again, *has to prove guilt beyond a reasonable doubt or to a moral certainty in order to overcome the presumption of innocence.*
>
> • • •
>
> The State is not required to convince you of Mr. Harvell's guilt beyond a reasonable doubt and to the point that you could not possibly be mistaken, *but simply beyond all reasonable doubt and to a moral certainty.*

Id. at 1545, 1546.

The jury charge in Felker's case made the following references to "moral certainty":

> In a criminal case, however, the state must prove each of its contentions *beyond a reasonable doubt and to a moral certainty.*
>
> The law does not require the defendant to prove that he is innocent. His innocence is conclusively presumed until the contrary is established by the evidence beyond a reasonable doubt. The state, however, is not required to prove his guilt beyond all doubt. *Moral and reasonable certainty is all that can be expected in a legal investigation.*

App. A at 1102 (emphasis added). In Felker's case, as in *Harvell*, any potential constitutional harm caused by these references to "moral certainty" were eradicated by the language in the rest of the charge, which grounded the definition of reasonable doubt in the evidence. *Harvell*, 58 F.3d at 1543-44; *see also, Victor*, ___ U.S. at ___, 114 S. Ct. at 1248.

In *Victor,* the Court found that the trial court's reference in the charge to "an abiding conviction . . . of the guilt of the accused" did "much to alleviate any concerns that the phrase moral certainty might be misunderstood in the abstract." *Victor,* ___ U.S. at ___, 114 S. Ct. at 1249, 1250. In *Harvell,* the trial court instructed the jury that reasonable doubt had to be derived from the evidence and that reasonable doubt could not be "fanciful, vague, whimsical, capricious, conjectural or speculative." *Harvell,* 58 F.3d at 1543. Likewise, in this case, the trial court's definition of reasonable doubt as "doubt which is based on the evidence, a lack of evidence or a conflict in the evidence" and "doubt which is reasonably entertained as opposed to vague or fanciful or farfetched doubt," served to erase any taint created by the term "moral certanty" and to thus place it beyond the potential for constitutional harm. App. A at 1102. "The instruction thus explicitly told the jurors that their conclusion had to be based on the evidence in the case." *Victor,* ___ U.S. at ___, 114 S. Ct. at 1248. "Accordingly, there is no reasonable likelihood that the jury would have understood moral certainty to be disassociated from the evidence in the case." *Id.* In sum, the combination of the defining phraseology set out above, together with the remainder of the charge, which included other explanations and qualifications of the term "reasonable doubt,"[5] "convinces us that it was

[5] "If after you consider all the facts and circumstances in the case your minds are wavering, unsettled and unsatisfied, then that is the doubt of the law, and you should acquit the defendant." App. A at 1103. "No conviction should rest upon suspicion, conjecture or the possibility of guilt." *Id.* at 1105-06. "[B]efore you would be authorized to convict on evidence which is entirely circumstantial, such evidence must not only prove the guilt of the accused beyond every reasonable doubt, but it must also exclude every other reasonable theory except that of guilt." *Id.* at 1105.

not reasonably likely that the jury understood the instructions to allow conviction based upon proof insufficient to meet the *Winship* standard." *Harvell,* 58 F.3d at 1545 (emphasis added).

In addition to contending that the trial court's charge to the jury violated his due process right under *Cage,* Felker also argues that the prosecutor's remarks to individual jurors during voir dire regarding the state's burden of proof implicate the same concern as that addressed by the Supreme Court in *Cage.* Felker correctly points out that, during voir dire, the prosecutor explained to several jurors that "moral and reasonable certainty is all that is required in a legal investigation." *See, e.g.,* (R. 215, 265, 314, 393, 587, 629).

The purpose of voir dire examination is to allow the government and the defendant to evaluate and select an impartial jury capable of fairly deciding the issues presented by applying the law *as instructed by the court* to the facts as produced during the trial. *United States v. Miller,* 758 F.2d 570, 571 (11th Cir.) (emphasis added), *cert. denied,* 474 U.S. 994, 106 S. Ct. 406, 88 L. Ed. 2d 357 (1985). (emphasis added). We note that, immediately following voir dire, the court explicitly instructed the impannelled jurors that "[a]rguments by counsel are not evidence, and you are not bound by them." (R. 4). In light of our conclusion that the trial court's jury charge, viewed in its entirety, appropriately instructed the jury with respect to

its responsibility to find the defendant guilty beyond a reasonable doubt, and therefore did not violate Felker's due process right pursuant to *Cage*, we find that the prosecutor's remarks during voir dire to which Felker now objects were adequately rectified by the jury charge and the timely admonition to the jury discussed above, and did not taint the trial or the verdict.

Therefore, we conclude that even if Felker's claim under *Cage* was not barred under pre-Act second or successive petition law, he could not prevail on its merits because the trial court's references to "moral certainty," when viewed in context, as well as the admonition of the trial judge to the jury relative to the arguments of counsel, the entire charge, and the proximity of the charge to the jury's deliberation, did not create a reasonable likelihood that the jury was misled as to the proper burden of proof or encouraged to arrive at its verdict by applying a standard of proof lower than reasonable doubt.

B. Felker's Claim that Permitting a Non-Physician Medical Examiner to Testify to the Time of Death Violated Due Process and the Eighth Amendment

Felker offers no cause for his failure to raise in his first federal habeas petition the claim that it was constitutional error to permit Warren Tillman, a non-physician medical examiner, to give his opinion concerning the time of the victim's death. Medical Examiner Tillman's qualifications, or lack thereof, were fully developed during direct and cross-examination at trial. Accordingly, the claim that Felker belatedly seeks to raise concerning that matter has been fully available to him since the trial in

1983. Felker does not proffer any other cause for his failure to raise this claim in his first federal habeas proceeding in 1993.

Turning to the fundamental miscarriage of justice exception to the cause and prejudice requirement, Felker has not shown that it is more likely than not that no reasonable juror would have convicted him but for the alleged constitutional error of permitting Tillman to offer an opinion as to the time of death. Tillman testified that in his opinion the victim could have been killed as many as fourteen days prior to her body being discovered on December 8, 1981, which would mean that she could have been killed as early as November 24, 1981, the date she was last seen alive. Felker had an alibi from 7:00 p.m. November 25, 1981 forward. He contends that Tillman's testimony was critical to his conviction, because he argues, "[t]he only evidence that the death occurred when [Felker] could have caused it was the 'expert' testimony of a non-physician [Tillman] employed by the prosecution arm of the State of Georgia." Application at 30-31. That simply is not true. Dr. James Q. Whitaker, a highly qualified pathologist and medical examiner (R. 428-30) also examined the pertinent evidence including photographs, the body itself after it was disinterred, tissue slides, and so forth, and he reached his own opinion concerning the time of death. The Georgia Supreme Court summarized Dr. Whitaker's testimony as follows:

> Dr. Whitaker, the medical examiner for Houston County, testified for the state in rebuttal. His early experience was in Baltimore, Maryland, and, perhaps due to the proximity of Chesapeake Bay, he had observed over "200

> drowning or immersion-type cases." Dr. Whitaker testified that – considering the air temperatures in the relevant time period; the fact that most missing and murdered persons die soon after they disappear; the fact that when Joy Ludlam was found, she was wearing the same clothes as when she was last seen alive; and the extent of decomposition – in his opinion, death occurred two weeks prior to the discovery of the body.

Felker v. State, 252 Ga. at 359, 314 So.2d at 631. We have reviewed Dr. Whitaker's testimony at trial, and he did testify that: "I would say most – in my opinion, the time of death is shortly after she became missing, and in my opinion it's more likely, with a reasonable degree of medical probability, that the death occurred 14 days ago when she was missing, found missing, but certainly, with the degree of decomposition that is *present*, three to five days, within that time frame is possible, but I think that the time, in my opinion, is older than that." (R. 997-98).

There is no question that Dr. Whitaker is a qualified pathologist. He is a medical doctor, having pursued a study in the specialty of pathology, including an internship and residency in pathology, and he is a board certified anatomic and clinical pathologist. He had taught forensic pathology, and at the time of trial was the Chief Pathologist and Director of Laboratories and Clinical Pathology at the Houston County Hospital, in Warner Robbins, Georgia (R. 428). At the time of his trial testimony, Dr. Whitaker had performed over 1500 autopsies (R. 430).

Moreover, there was other evidence, in addition to Dr. Whitaker's expert opinion, that the victim's death occurred fourteen days before her body was discovered, making it likely that she was killed around November 24, 1981. It was undisputed that the victim's car was seen parked in an local bank parking lot on the evening of November 24, and the next morning her car was still parked there, apparently abandoned. There was also evidence that she had placed a call to her employer during the early evening of November 24, stating that she would not be working that evening. Felker admitted to an officer that the victim had made that telephone call from his home. When her body was discovered two weeks after she disappeared, it was clothed in the same dress she had been wearing when last seen on November 24. When that evidence is combined with other evidence of Felker's guilt, including the remarkable similarities between this crime and a similar crime he had committed and been convicted for earlier, *see Felker v. Thomas*, 52 F.3d at 908, we readily conclude that Felker has not shown that but for the alleged constitutional violation of permitting Warren Tillman to offer his opinion as to the time of death, it is more likely than not that no reasonable juror would have convicted him.

Although pre-Act law certainly did not restrict the second and successive petition bar only to claims that lacked merit, we do note, for the sake of completeness, that this claim lacks merit. As we have pointed out previously, this claim is based upon the false premise that Warren Tillman was the only expert witness who testified to an opinion consistent with the victim having been killed at a time for which Felker did not have an alibi. But

the record clearly shows that Dr. Whitaker, who was unquestionably qualified to give such an opinion, also testified to the same opinion as Tillman. In addition to the expert testimony, there was other evidence, which we have already discussed, establishing that the victim died as early as November 24, 1981. The standard of review for state evidentiary rulings in federal habeas corpus proceedings is a narrow one. Only when evidentiary errors "so infused the trial with unfairness as to deny due process of law" is habeas relief warranted. *Lisenba v. California*, 314 U.S. 219, 228, 62 S. Ct. 280, 286 (1941), *quoted and applied in, Estelle v. McGuire*, 502 U.S. 62, 75, 112 S. Ct. 475, 484 (1991); *accord Baxter v. Thomas*, 45 F.3d 1501, 1509 (11th Cir.) (evidentiary ruling claims reviewed only to determine whether the error "was of such magnitude as to deny fundamental fairness"), *cert. denied*, 116 S. Ct. 385 (1995); *Kight v. Singletary*, 50 F.3d 1539, 1546 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 785 (1996). Such a determination is to be made in light of the evidence as a whole. Viewing the evidence in this case in its entirety, the introduction of Warren Tillman's testimony did not so infuse the trial with unfairness as to deny Felker fundamental fairness and due process of law.

C. Actual Innocence as an Independent Constitutional Claim

Thus far we have discussed actual innocence only in the *Schlup v. Delo* "gateway" procedural, as distinguished from independent substantive, sense. *See* 115 S. Ct. at 860-61. Although not entirely clear, it appears from his application that Felker also may be seeking to either

litigate actual innocence as a separate constitutional claim, or at least be seeking to challenge the Act as unconstitutional on the grounds that it precludes assertion of a separate and independent constitutional claim of actual innocence. More likely the latter. In regard to that possibility, the State has responded that the Act does not modify the law involving actual innocence claims. We need not decide whether the Act precludes such claims, because even if it did, that modification of the law would not affect Felker who does not have a valid actual innocence claim, anyway.

Justice O'Connor joined by Justice Kennedy, both of whose votes were necessary to the majority in *Herrera v. Collins*, 506 U.S. 390, 113 S. Ct. 853 (1993), explained that that decision left open the difficult question of whether federal habeas courts may entertain convincing claims of actual innocence. *Id.* at 472, 113 S. Ct. at 874. Justice O'Connor characterized the *Herrera* decision as assuming "for the sake of argument that a truly persuasive demonstration of actual innocence would render any such execution unconstitutional and that federal habeas relief would be warranted if no state avenue were open to process the claim." *Id.* Making that same assumption, Felker is not entitled to habeas relief for two reasons. First, the *Herrera* opinion itself noted that, unlike Texas, Georgia is a state that not only permits motions for new trial on newly discovered evidence grounds, but it also provides that the time for filing such motions can be extended. *Id.* at 411 n.11, 113 S. Ct. at 866 n.11; Ga. Code Ann. §§ 5-5-40 and 5-5-41 (Michie 1995).[6] Therefore, this

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[6] At the time of Felker's conviction and sentencing in February 1983, Georgia law allowed defendants to move for a

is not a case where there is "no state avenue . . . open to process the claim." *Id.* at 472, 113 S. Ct. at 874.

Second, Felker has failed to persuasively demonstrate his actual innocence. Justice O'Connor's characterization of the habeas petitioner in *Herrera* is equally applicable to Felker:

> He was tried before a jury of his peers, with the full panoply of protections that our Constitution affords criminal defendants. At the conclusion of that trial, the jury found petitioner guilty beyond a reasonable doubt. Petitioner therefore does not appear before us as an innocent man on the verge of execution. He is instead a legally guilty one who, refusing to accept the jury's verdict, demands a hearing in which to have his culpability determined once again.

Id. at 419-20, 113 S. Ct. at 870. The only evidence Felker offers that was not offered at his trial are the affidavits of two medical examiners who criticize the qualifications of Medical Examiner Tillman and disagree with his opinion about the time of death. Neither of Felker's new experts impugn in any way the qualifications of Dr. James Whitaker, another medical examiner, who testified to the same opinion about the time of death as did Tillman. At most,

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new trial on the basis of newly discovered evidence. *See Dick v. State*, 287 S.E.2d 11, 13 (1982). While Georgia law generally requires motions for a new trial to be made within 30 days of entry of judgment, *see* Ga. Code Ann. § 5-5-40 (Michie 1995), it also permits "extraordinary" motions to be filed after this deadline, *see* Ga. Code Ann. § 5-5-41 (Michie 1995). This was also true back in 1983 at the time of Felker's conviction and sentence in Houston County Superior Court. *See Dick*, 287 S.E.2d at 13 & n.2.

the belated affidavits are cumulative evidence in support of Felker's position on the time of death issue. There was expert opinion testimony on both sides of that issue at trial, as well as other evidence. Considering it all, we do not doubt in the least Felker's guilt.

Moreover, permitting such last minute affidavits to reopen guilt issues, absent truly extraordinary circumstances which are not present here, would open up virtually any capital case in which expert testimony was presented on behalf of the State to relitigation on the eve of execution. We do not believe that the Constitution or anything in the *Herrera* decision requires that, particularly where, as here, we are convinced that, "[p]etitioner is not innocent, in any sense of the word." *Id.* at 419, 113 S. Ct. at 870 (concurring opinion of O'Connor, J., joined by Kennedy, J.).

III. CONCLUSION

Felker has failed to show substantial grounds upon which relief might be granted under the new Act. Likewise, he has failed to show substantial grounds upon which relief might be granted insofar as any constitutional issues involving the Act are concerned, because he would not be entitled to any relief even under pre-Act law.

The request for a stay of execution is DENIED.

The application for an order authorizing the filing of a second or successive petition is DENIED.

[T. 1101]

THE STATE OF GEORGIA	)	Indictment No. 12405
vs.	)	Murder, Agg. Sodomy, Rape, et al
ELLIS WAYNE FELKER	)	CHARGE OF THE COURT

Members of the jury, on May 17, 1982, the grand jury of this circuit indicted the defendant, Ellis Wayne Felker, and charged him with the offenses of rape, aggravated sodomy, false imprisonment, robbery and murder.

To that indictment, and to those charges, Mr. Felker has entered his plea of not guilty, thereby denying and challenging each and every essential allegation in the indictment.

As I previously mentioned to you, the robbery charge is no longer before you because as a matter of law such charge was not proved, and the instructions which I will now give you will apply to each remaining charge in the indictment, unless I state otherwise.

Whether the other charges in the indictment have been proven is for you to decide based on the evidence on the instructions I will now give you.

The indictment, along with the defendant's plea of not guilty, will be out with you when you consider the case, and you may refer to them. They are not evidence, however, and you should not consider them as such. They simply represent the method by which the case was brought into court for trial.

[T. 1102] In spite of his indictment, the defendant is presumed to be innocent until his guilt is established by the evidence to the exclusion of and beyond every reasonable doubt. The burden of proof in this case, as in all criminal cases, rests upon the state, from the beginning to the end of the trial, to establish beyond a reasonable doubt every fact essential to the conviction of the defendant. That is, the state must prove beyond a reasonable doubt that a crime was in fact committed and that the defendant was the person who committed the crime.

The standard of proof in a criminal case is higher than that required in a civil case. In civil cases, a simple preponderance or greater weight of the evidence is considered sufficient to sustain a contention. In a criminal case, however, the state must prove each of its contentions beyond a reasonable doubt and to a moral certainty.

The law does not require the defendant to prove that he is innocent. His innocence is conclusively presumed until the contrary is established by the evidence beyond a reasonable doubt. The state, however, is not required to prove his guilt beyond all doubt. Moral and reasonable certainty is all that can be expected in a legal investigation.

A reasonable doubt is defined as a doubt which is based on the evidence, a lack of evidence or a conflict in the evidence. It is a doubt which is reasonably entertained as opposed to a vague or fanciful or farfetched doubt.

[T. 1103] If after you consider all the facts and circumstances in the case your minds are wavering, unsettled and unsatisfied, then that is the doubt of the law, and

you should acquit the defendant. On the other hand, if such doubt does not exist in your minds as to his guilt, you should convict him.

One of the elements in every criminal case is the matter of venue; that is, the state must prove that the crime occurred in the county in which the case is being tried. For example, if a crime occurs in Houston County, then the trial for that crime shall be in Houston County.

In a murder case, the trial may be held in the county where the cause of death was inflicted or in the county where death actually occurred, if it cannot be determined where the cause of death occurred.

The defendant in this case contends that the state has not proved the element of venue. In that respect I instruct you that it is the state's burden, with respect to each charge in the indictment, to prove beyond a reasonable doubt that the crime might have been committed in Houston County. If the state fails to do this, then the defendant is entitled to a verdict of not guilty.

You are the sole judges of the credibility of the witnesses and of the weight to be given their testimony, you may take into account his or her ability and opportunity to observe the facts; his or her memory; the witness' manner [T. 1104] while testifying; any interest, bias or prejudice the witness may have, and you may also consider the reasonableness of such testimony.

If there are conflicts in the evidence, it is your duty under the law the [sic] reconcile them wherever possible so as to make all the witnesses speak the truth and not attribute a false statement to any of them. If you cannot

do this, however, then you would believe that testimony which is most reasonable and credible to you.

A witness' testimony may be impeached or discreditied [sic] by disproving the facts testified to by him or her, or by showing that the witness made a previous statement or statements inconsistent with or contradictory to the testimony given at trial.

If you determine that the testimony of any witness has been impeached or discredited in that manner, you are authorized to believe or disbelieve said witness' testimony in whole or in part.

If you find that any witness has been placed under hypnosis for the purpose of refreshing or improving that witness' recollection, and if you find that such testimony is in whole or in part induced by the hypnosis, then to the extent that it was you would disregard such testimony.

Ordinarily the court receives the testimony of witnesses only as to facts to which the witness has particular and direct knowledge. In certain cases, however, where a particular degree of skill or knowledge is required to [T. 1105] understand the situation, the law receives the opinion of those deemed to be expert in certain lines. The opinion testimony of an expert can be based on hypothetical questions or based on the expert's observations. You should not consider any opinion at all unless the facts upon which it is based on found by you to be true.

Even though you are permitted to receive the testimony of an expert, you are not bound by such testimony. The !aw allows you to receive it and consider it, along with all the other evidence in the case.

Evidence is either direct or circumstantial. Direct evidence is that which itself speaks to the issue involved. Indirect or circumstantial evidence is that which by its consistency suggests or implies that a certain claim or theory is true.

Criminal conduct may be proved by circumstantial evidence as well as by direct evidence. However, before you would be authorized to convict on evidence which is entirely circumstantial, such evidence must not only prove the guilt of the accused beyond every reasonable doubt but it must also exclude every other reasonable theory except that of guilt.

In other words, if the circumstances in the case are subject to equally reasonable constructions, one indicating guilt and the other innocence, you are obligated under the law to accept that construction indicating innocence.

No conviction should rest upon suspicion, conjecture [T. 1106] or the possibity [sic] of guilt.

A crime is defined as a violation of a statute of this state in which shall be a union of joint operation of act and intention. Criminal intent is a necessary element of a crime, and the state must prove such interest, just as it must prove every other essential element of the crime.

No person should be found guilty of any crime which is committed by misfortune or accident, where it satisfactorily appears there was no criminal intention.

No one is presumed to act with criminal intention, but you may find such upon a consideration of the words, conduct, demeanor, motive and all other circumstances

connected with the offense. You may likewise find a lack of criminal intent upon such a consideration.

Every person is presumed to be of sound mind and discretion and is presumed to intend the natural and probable consequences of his acts. The acts of such a person are presumed to be intentional. These presumptions may be rebutted by any evidence to the contrary.

In this case, the state has contended that the defendant was involved is a similar offense in 1976, and evidence was offered concerning the 1976 occurrence. The court allowed that evidence solely for you to decide whether it might tend to illustrate the defendant's motive, intent or state of mind with respect to the charges for which is is now on trial, and for no other purpose.

Whether the defendant in fact committed such other [T. 1107] offense, and if so, whether it illustrates his state of mind in this case, is a matter for you to decide.

In order for any crime to have been committed upon the person of the victim in this case, you must find beyond a reasonable doubt that such crime, if any, was committed upon her before she died.

In count one of the indictment, the defendant is charged with the offense of rape. A person commits rape when he has carnal knowledge of a female forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration, however slight, of the female sex organ by the male sex organ. For such carnal knowledge to constitute the offense of rape, the penetration must have been accomplished by force and against the will and without the consent of the female alleged to have been

raped. The offense of rape is not complete if the element of force is lacking in the commission of the sexual act.

In count two of the indictment, the defendant is charged with the offense of aggravated sodomy. A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the anus of another. A person commits the offense of aggravated sodomy when he commits sodomy with force and against the will of the other person.

In this case, the state must prove beyond a reasonable doubt that the defendant inserted his sex organ into the anus of Evelyn Joy Ludlam with force and against her will [T. 1108] in order for there to be a conviction under this count.

In count three of the indictment, the defendant is accused of the offense of false imprisonment. A person commits the offense of false imprisonment when, in violation of the personal liberty of another, he detains such person without legal authority.

In court five of the indictment, the defendant is charged with the offense of murder. A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention to kill which is manifested or shown by external circumstances capable of proof.

Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart. Malice is an essential element of murder, and it must exist before any homicide can be murder. Malice in its legal sense is

not necessarily ill will or hatred. It is the unlawful, deliberate, preconceived intention to kill a human being without justification or excuse, which intention must exist at the time of the killing. If such intention enters the mind of the slayer a moment before he commits the fatal act, that is sufficient.

Members of the jury, you should take the instructions which I have given you in this case and apply them to the facts as you find the facts to be, and arrive at a verdict [T. 1109] which speaks the truth. The object of every legal investigation is the discovery of the truth. You are not concerned with the effect or consequence of your verdict. You are only concerned that the speak the truth.

As to each count in the indictment, the four remaining counts, members of the jury, if you believe beyond a reasonable doubt that the defendant is guilty as charged in the indictment, it would be your duty to convict him, and the form of your verdict in that event would be, "We find the defendant guilty."

On the other hand, if you do not believe that the defendant has committed the offense with which he's charged or any one of them dealing with each particular count, or if you entertain a reasonable doubt as to the defendant's guilt, it would be your duty to acquit him, and in that event the form of your verdict would be, "We find the defendant not guilty."

Whatever your verdict is, members of the jury, one of you as foreperson of the jury should write it out separately as to each count on the back of the indictment. You should then date it and sign it. Then you would notify the bailiff that you have arrived at your verdict,

and you will be asked to come back into the courtroom so that your verdict can be published as provided by law.

I ask at this time, please, that the 12 of you on the regular jury panel retire to this jury room. I'm going to ask the two alternates for the time being to retire back here [T. 1110] believe, I believe to my office. Any objection to that, for the time being? All right.

(The jury thereupon left the courtroom at 2:28 p.m.)

* * *

THE COURT: Does the state have any exceptions to the charge?

MR. FINLAYSON: No, sir, your Honor.

THE COURT: Do you at this time, Mr. Hasty or Mr. Brown?

MR BROWN: Judge, the only thing that, other than failure to give our requests to charge, that I would make exception to is the judge charged, like a lot of courts do, that the jury must make the witnesses speak the truth; that coupled with the fact that the judge charged the jury that they have a duty to convict if they find that there's not reasonable doubt, I think the combination there would tell the jury they have to believe somebody that they may otherwise decide to disregard entirely, whether or not the person has been impeached.

I think one privilege the jury would have would be to simply disregard somebody's testimony without that person being impeached, and the judge's charge does not give them that option. I would point that out now, but, of

course, we don't waive the various other requests. I don't have a list of all of the requests that were not given at this time.

I don't recall one on the wavering mind, if the jury [T. 1111] were to say that –

MR. HASTY: Yeah.

MR. BROWN: Was that given? We would reserve our right to any further objection.

I think you may reserve your exceptions. I don't think under the present law you are required to go into any detail as to any problems with the charge; and, as I said, now, we will get a copy of your requests, along with those of the state, marked filed.

Now, do you want to get together and get the evidence to go to the jury?

(The exhibits were thereupon gathered by counsel and the reporter.)

(The exhibits were taken to the jury at 2:43 p.m.)

Now, let me tell you what I have in mind doing with respect to the two alternates, is to continue sequestering them until such time as this jury reaches a verdict.

Now, my impression is that they can be called on to serve in connection with this case up until that time. Once this jury decides the verdict, I think their services are over, even if the jury convicts the defendant. I question whether they would be permitted to serve in an alternate capacity in the sentence phase not having participated in the guilt or innocence. I don't think they could.

MR. DANIEL: The law says the same jury shall consider the penalty as considered the first . . .

SUPREME COURT OF THE UNITED STATES

No. 95-8836 (A-890)

ELLIS WAYNE FELKER, PETITIONER *v.*
TONY TURPIN, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND PETITION FOR WRIT OF HABEAS CORPUS

[May 3, 1996]

The application for stay of execution of sentence of death presented to Justice Kennedy and by him referred to the Court is granted. The motion for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted. The parties shall submit briefs limited to the following questions: (1) Whether Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996 (the Act), and in particular Section 106(b)(3)(E), 28 U.S.C. § 2244(b)(3)(E), is an unconstitutional restriction of the jurisdiction of this Court. (2) Whether and to what extent the provisions of Title I of the Act apply to petitions for habeas corpus filed as original matters in this Court pursuant to 28 U.S.C. § 2241. (3) Whether application of the Act in this case is a suspension of the writ of habeas corpus in violation of Art. I, § 9, clause 2 of the Constitution.

The parties' briefs are to be filed with the Clerk of this Court and served upon opposing counsel on or before 2 p.m., Friday, May 17, 1996. Reply briefs, if any, may be filed with the Clerk of the Court and served upon

opposing counsel on or before 2 p.m., Tuesday, May 28, 1996. The Solicitor General is invited to file a brief expressing the views of the United States. Briefs may be submitted in compliance with Rule 33.2 to be replaced as soon as possible with briefs prepared under Rule 33.1. Rule 29.2 does not apply. Oral argument is set for Monday, June 3, 1996, at 10 a.m.

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

In my opinion, it is both unnecessary and profoundly unwise for the Court to order expedited briefing of the important questions raised by the petition for certiorari and application for a writ of habeas corpus. Even if the majority were right that this petition squarely presents substantial constitutional questions about the power of Congress to limit this Court's jurisdiction, our consideration of them surely should be undertaken with the utmost deliberation, rather than unseemly haste. Accordingly, I respectfully dissent from the entry of the foregoing order.

No. 95-8836

In The

Supreme Court of the United States

October Term, 1995

ELLIS WAYNE FELKER,

Petitioner,

v.

TONY TURPIN, Warden,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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39 pp

QUESTIONS PRESENTED

(1) Whether Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996 (the Act), and in particular Section 106(b)(3)(E), 28 U.S.C. § 2244(b)(3)(E), is an unconstitutional restriction of the jurisdiction of this Court.

(2) Whether and to what extent the provisions of Title I of the Act apply to petitions for habeas corpus filed as original matters in this Court pursuant to 28 U.S.C. § 2241.

(3) Whether application of the Act in this case is a suspension of the writ of habeas corpus in violation of Art. I, § 9, clause 2 of the Constitution.

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The opinion of the United States Court of Appeals for the Eleventh Circuit is not yet reported. *Felker v. Turpin*, No. 96-1077, ___ F.3d ___ (11th Cir. May 2, 1996).

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit denying Petitioner's motion for permission to file a habeas corpus petition in the district court was entered on May 2, 1996. This Court granted review on May 3, 1996. This Court has jurisdiction to entertain this matter under 28 U.S.C. §§ 2241, 2254(a) and 1651.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Article I, section 9, clause 2 of the Constitution provides as follows:

> "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

Article III, section 2, clause 2 provides in relevant part:

> "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

The Eighth Amendment provides in relevant part:

> "[N]or [shall] cruel and unusual punishments [be] inflicted;

The Fourteenth Amendment provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . . "

28 U.S.C. § 2241 provides in relevant part:

> "(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions."
>
> "(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it."

28 U.S.C. § 2244(b) provides in relevant part:

> "(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> "(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –
>
> > "(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

> > "(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> >
> > "(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.
>
> "(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
>
> "(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
>
> "(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.
>
> "(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.
>
> "(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

"(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section."

STATEMENT OF THE CASE

Section 106(b)(3)(E) of the Anti-Terrorism and Effective Death Penalty Act of 1996 ["the Act"], amends 28 U.S.C. § 2244(b).[1] Section 2244(b) deals with second or successive federal habeas corpus applications filed by persons held in custody pursuant to a judgment of a state court. The new Act makes two changes from prior law:

First. The Act establishes new substantive requirements for second or successive applications. Section

[1] Prior to its amendment, section 2244 provided:

(b) When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

2244(b)(1) provides that an application raising a claim that had been presented in a prior petition "shall be dismissed." Section 2244(b)(2) provides that second or successive habeas petitions raising new claims also must be dismissed, unless the application satisfies certain prescribed standards.[2]

Second. The Act establishes a procedure that must be followed "[b]efore a second or successive application permitted by this section is filed in the district court." 28 U.S.C. § 2244(b)(3)(A). A prisoner who wishes to file such a petition in the district court must first move the court of appeals for "an order authorizing the district court to consider" the petition. *Id.* That motion must be "determined by a three-judge panel of the court of appeals," which shall issue an order "only if it determines that the

[2] Section 2244(b)(2) now provides:

"A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –

"(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

"(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

"(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

application makes a prima facie showing that the application satisfies the requirements of [subsection (b)(2)]." *Id.* § 2244(b)(3)(B) and (C).

The final feature of the new procedure is the focus of the present case. Under amended § 2244(b)(3)(E), the court of appeals' decision either to grant or to deny the prisoner's motion "shall not be appealable and shall not be the subject of a petition for rehearing *or for a writ of certiorari*" (emphasis supplied).

The petitioner, Ellis Wayne Felker, moved the court of appeals for an order authorizing him to file a second or successive petition in the district court.[3] The three-judge panel assigned to the case denied that motion. *Felker v. Turpin*, No. 96-1077 (11th Cir. May 2, 1996). Finding himself barred from filing a petition in the district court, Mr. Felker sought this Court's appellate review of the panel's decision. In doing so, he invoked the Court's jurisdiction pursuant to 28 U.S.C. §§ 2241 and 1651.

On May 3, 1996, this Court ordered the parties to submit briefs "limited to the following questions:"

> (1) Whether Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996 (the Act), and in particular Section 106(b)(3)(E), 28 U.S.C. § 2244(b)(3)(E), is an unconstitutional restriction of the jurisdiction of this Court.
>
> (2) Whether and to what extent the provisions of Title I of the Act apply to petitions for

[3] This motion was filed on May 1, 1996, one week after the President signed the new act into law on April 24, 1996.

> habeas corpus filed as original matters in this Court pursuant to 28 U.S.C. § 2241.
>
> (3) Whether application of the Act in this case is a suspension of the writ of habeas corpus in violation of Art. I, § 9, clause 2 of the Constitution.

SUMMARY OF ARGUMENT

Question (2) is essentially one of statutory construction. We address it first for that reason and because the manner of its resolution has important implications for the constitutional issues raised.[4]

Point I argues that the Act does not remotely purport to interfere with this Court's original habeas jurisdiction. Apart from its preclusion of certiorari, the Act is plainly intended to regulate only matters relating to the disposition of habeas applications in the lower federal courts. To read the Act as affecting this Court's jurisdiction by implication would contravene not only the Act's plain meaning but also settled doctrines basic to the structure of our government. This Court's indispensable role in establishing uniformity concerning the content of federal constitutional law has been long acknowledged. What is

[4] Questions (1) and (3) could be read expansively to reach beyond the implications of § 2244(b)(3)(E) for this Court's jurisdiction to examine the panel's judgment below. We understand the Court to be primarily concerned with that immediate issue. In this brief, prepared on an expedited schedule, we therefore confine our attention to the comparatively narrow (though extremely important) problems that the jurisdictional issue presents.

more, the Court has had an equally historic role in using "original" habeas as a method of ensuring that those confined in custody are held only in accordance with constitutionally valid rules and procedures. To leave the judgments of the courts of appeals unreviewable would compromise both functions, and it would be inconsistent with the reasoning of landmark cases in this Court.

Point II argues that the new statute presents no appreciable constitutional difficulties if read to leave the Court's habeas jurisdiction in place. (Questions as to the scope of the Court's exercise of that jurisdiction require further consideration.) If, however, the Act is read to bar all review by this Court of the decision below, it is unconstitutional. The Constitution must be read to make sense in all its parts and the grant to Congress of a power to shape exceptions to the appellate jurisdiction of the Supreme Court is not a license to destroy this Court's essential function in the constitutional plan. Whatever the ultimate scope of congressional power to regulate this Court's appellate jurisdiction, we submit that when an individual suffers a severe deprivation of liberty and asserts a claim that he is being confined pursuant to rulings and practices that violate the Constitution of the United States, such a claim cannot be wholly withdrawn from the cognizance of this Court.

Point III argues that the Habeas Corpus Suspension Clause supplies no independent basis for invalidating the application of the statute in this case, in view of the disposition by the court below. To argue that it does would require us to contend that Congress cannot provide for the initial consideration of successive petitions by three inferior federal judges rather than one. We make no such

contention. But the Suspension Clause adds weight to our construction of Article III. It strongly reinforces the special nature of the jurisdictional issues raised if there is an effort to cut off this Court's review of the legal claims of persons held in unconstitutional confinement.

The Court's jurisdiction to entertain Mr. Felker's prayer for a writ of habeas corpus under § 2241 of the Judicial Code is plain. The Court should accordingly permit him to show by further briefing that he is entitled to the exercise of that jurisdiction and to relief on the merits of his constitutional claims.

ARGUMENT

I. SECTION 2244(b)(3)(E) IS INAPPLICABLE TO HABEAS CORPUS PETITIONS FILED IN THIS COURT PURSUANT TO 28 U.S.C. § 2241.

Since the foundation of the Republic, this Court has possessed authority to issue "original" writs of habeas corpus. Judiciary Act of 1789, § 14, ch. XX, 1 Stat. 81-82. Like the Court's authority to issue writs of mandamus and prohibition, *e.g.*, *Ex parte Republic of Peru*, 318 U.S. 578 (1943), the writ is a method of *appellate* review, as numerous decisions of this Court recognize. *See, e.g., Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 102-03 (1869). *See also* Dallin H. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 Sup. Ct. Rev. 153.[5]

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[5] *Cf. Ex parte Republic of Peru*, 318 U.S. at 585-86 n.4 (the Judiciary Act of 1925 left in place this Court's jurisdiction to issue extraordinary writs).

The Court's longstanding authority to issue "original" writs of habeas corpus is currently codified in 28 U.S.C. § 2241(a). The 1996 Act does not purport to affect that jurisdiction. Except for its bar to petitions for certiorari, the Act is plainly confined to regulating the disposition of successive habeas petitions in the lower federal courts. To read this statute as affecting by implication the Court's traditional § 2241 jurisdiction would be profoundly at variance with deeply embedded principles of statutory construction, and it would require rejecting the reasoning of this Court's landmark decisions in *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), and *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869).

A. Plain Meaning.

Prior to the 1996 enactment, second and successive petitions were filed initially in the district court. By its terms, the statute now requires that a prisoner move the court of appeals for authorization to file such a petition "in the district court." 28 U.S.C. § 2244(b)(3)(A). Subsection (b)(3)(B) requires a three-judge panel to rule on an application "authorizing the district court" to consider a second or successive application. And subsection (b)(4) directs that "[a] district court" shall dismiss petitions "unless the applicant shows that the claim satisfies the requirements of this section."

Except for its limitation on "writ[s] of certiorari," the Act makes no mention of this Court's jurisdiction.[6] With that sole exception, the text of the Act is expressly confined to adjusting the relationship between the courts of appeals and the district courts in cases of second and successive habeas petitions.[7]

Thus, by its plain meaning the Act affects the lower courts' jurisdiction but only the certiorari jurisdiction of this Court. And this straightforward reading of the statutory language makes good sense. The new Act achieves change without sweeping all of our traditions into the fire. On the one hand, it expedites the habeas process and addresses the important state interest in the finality of judgments.[8] A circuit panel screens petitions at the gate to forestall mistakes that district courts might otherwise make. The panel's decision on this threshold issue is

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[6] This Court ordinarily has statutory certiorari jurisdiction to review any and all cases in the circuit courts. 28 U.S.C. § 1254(1). Fairly read, the reference to "certiorari" in section 2244(b)(3)(E) means statutory certiorari under § 1254(1) and thus only purports to withdraw the appellate jurisdiction over certiorari petitions that § 1254(1) otherwise would confer.

[7] More than any other consideration, plain meaning controls statutory construction. *See, e.g., Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 474-75 (1992); *Sullivan v. Stroop*, 496 U.S. 478, 482 (1990).

[8] *See, e.g.*, H.R. Rep. No. 23, 104th Cong., 1st Sess. 9 (1995) (stating that the original bill reported by the House Judiciary Committee was "designed . . . particularly to address the problem of delay and repetitive litigation in capital cases"); H.R. Conf. Rep. No. 518, 104th Cong., 2d Sess. 111 (1996) (bill "address[es] the acute problems of unnecessary delay and abuse in capital cases").

typically final: neither the prisoner nor the warden has recourse in the district court, in the full court of appeals sitting *en banc*, or in this Court on ordinary certiorari review. The statute simultaneously creates a strict screening mechanism and minimizes the litigation required to implement it. On the other hand, the Court's immemorial power to review plainly wrong refusals of habeas corpus relief on the basis of improper legal standards applied by lower federal courts remains undisturbed.

B. Precedents.

This is, however, more than just a plain meaning case. At stake is the appellate jurisdiction of this tribunal, the central judicial organ in our constitutional order. The Court has a long tradition against construing legislation so as to impair the traditional roles of any of the organs of government in our federal system.[9] That tradition is surely applicable here. In *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), this Court upheld its constitutional authority to review state court judgments rejecting claims

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[9] Statutes will not be deemed to have affected the sovereign immunity of the States unless the congressional intention to do so is unmistakable. *See, e.g., Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1123 (1996); *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989). Similarly, the Court has refused to find that the President could be subject to suit as an "agency" under the general provisions of the Administrative Procedure Act. *See, e.g., Dalton v. Specter*, 114 S. Ct. 1719, 1724-25 (1994). Moreover, the Court has been reluctant to assume that general congressional legislation was meant to regulate the inherent powers of the lower federal courts. *See, e.g., Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991).

of federal right. The Court emphasized the need for its appellate jurisdiction based upon "the importance, and even the necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution." *Id.* at 347-48 (emphasis omitted). For this reason among others, the Court has consistently interpreted statutes that would preclude judicial review of executive and administrative action as not applying to claims of unconstitutional conduct. *Webster v. Doe*, 486 U.S. 592, 603 (1988) ("[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.")

This institutional imperative is intensified here by another consideration: the historic importance of habeas corpus. The writ is "aptly described as the 'highest safeguard of liberty.' " *Lonchar v. Thomas*, 116 S. Ct. 1293, 1298 (1996) (quoting *Smith v. Bennett*, 365 U.S. 708, 712 (1961)). Through habeas, this Court has for more than a century played an important role in protecting against unconstitutional deprivations of life and liberty. Any argument that the Act strips the Court entirely of its authority to examine in any way the claim of persons that they are being held in custody under rules, rulings, or practices that violate our fundamental law calls for the rejection of the Court's historic traditions. " '[T]here is no higher duty than to maintain [the writ of habeas corpus] unimpaired.' " *Johnson v. Avery*, 393 U.S. 483, 485 (1969) (quoting *Bowen v. Johnston*, 306 U.S. 19, 26 (1939)). That is a long entrenched view. *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807).

No serious argument can be made that by negative implication § 2244(b)(3)(E) abrogates this Court's original

habeas jurisdiction, if this Court's landmark precedents are to be followed. The Court rejected any argument along those lines more than a century ago in both *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), and *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869).

In *McCardle*, the Court deferred to Congress' explicit repeal of the statute authorizing the habeas petitioner's appeal. Near the end of its opinion, however, the Court made clear that it could exercise jurisdiction in a future case on an alternative basis, not invoked in the case before the Court – namely, the predecessor to § 2241:

> Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.

McCardle, 74 U.S. at 515.

A year later, the Court squarely rested its decision in *Yerger* on the proposition it had stated in *McCardle*. The Court spoke in strong terms, stressing both the need for uniformity and the need to protect against unconstitutional deprivation of liberty:

> It is proper to add, that we are not aware of anything in any act of Congress, except the Act of 1868, which indicates any intention to withhold appellate jurisdiction in *habeas corpus* cases from this court, or to abridge the jurisdiction derived from the Constitution and defined by the act of 1789. We agree that it is given subject

> to exception and regulation by Congress; but it is too plain for argument that the denial to this court of appellate jurisdiction in this class of cases must greatly weaken the efficacy of the writ, deprive the citizen in many cases of its benefits, and seriously hinder the establishment of that uniformity in deciding upon questions of personal rights which can only be attained through appellate jurisdiction, exercised upon the decisions of courts of original jurisdiction. . . .
>
> These considerations forbid any construction giving to doubtful words the effect of withholding or abridging this jurisdiction. They would strongly persuade against the denial of the jurisdiction even were the reasons for affirming it less cogent than they are.

Yerger, 75 U.S. at 102-03.

We recognize that *McCardle* and *Yerger* were first petition cases. *See Lonchar v. Thomas*, 116 S. Ct. at 1299. But they are apposite here on the point of statutory construction. As *Lonchar* noted:

> Dismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty. See *Ex Parte Yerger*, 8 Wall. 85, 95 (1869) (the writ "has been for centuries esteemed the best and only sufficient defence of personal freedom"); *Withrow [v. Williams*, 507 U.S. 680, 700] (O'Connor, J., concurring in part and dissenting in part) (decisions involving limitation of habeas relief "warrant restraint"). Even in the context of "second and successive" petitions – which pose a greater

> threat to the State's interests in "finality" and are less likely to lead to the discovery of unconstitutional punishments – this Court has created careful rules for dismissal of petitions for abuse of the writ.

Id.

No basis exists for concluding that the Act, plainly read, affects this Court's historic authority to issue "original" writs of habeas corpus. As long ago as 1821, in Chief Justice Marshall's opinion in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), the Court required a clear statement before concluding that Congress intended to affect the Court's appellate jurisdiction. *Id.* at 379-80. Respect for that principle of construction is especially salutary here, in order to avoid the troublesome constitutional questions addressed in Part II below. *See, e.g., Webster v. Doe*, 486 U.S. at 603; *Johnson v. Robison*, 415 U.S. 361, 366-67 (1974) (statutes should be interpreted so as to avoid constitutionally troublesome limitations on the jurisdiction of the federal courts). As the Court recently reaffirmed, the "doctrine requiring avoidance of constitutional questions . . . require[s] us always to apply the clear statement rule before we consider the constitutional question whether Congress has the power to . . . [act]." *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1131 n.15 (1996).[10]

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[10] Not only did Congress fail to state that the statute abrogated this Court's jurisdiction. Congress failed even to confront the possibility that the statute might be read in that unlikely way. Nothing in the legislative history of the 1996 Act indicates that the proponents either were aware of the problem this might entail or, if they were aware of it, that they informed their colleagues in the House and the Senate.

II. If The Act Wholly Eliminates This Court's Appellate Jurisdiction It Is Void.

No unconstitutional interference with this Court's appellate jurisdiction exists if Congress merely eliminates one procedure for review but leaves in place an equally efficacious alternative. *See, e.g., McCardle*, 74 U.S. at 515. So long as the Court's "original" jurisdiction to issue habeas remains in place, the elimination of certiorari jurisdiction presents no appreciable constitutional difficulties.

We say this, however, on the premise that the Court will subsequently examine the standards that should govern its review under § 2241 of court of appeals decisions in second and successive petition cases. The Court's preexisting practice, described in Sup. Ct. R. 20 4(a), has treated the entire subject of original habeas as exceptional and discretionary. *Ex parte Abernathy*, 320 U.S. 219, 220 (1943). Because the Court has premised that practice on the availability of other modes of review by and of the lower federal courts, it may not be apposite in the current context. *See, e.g., Dixon v. Thompson*, 429 U.S. 1080, 1080-81 (1977).[11] But the question the Court has posed for expedited briefing here concerns only "jurisdiction," not the standards for the exercise of acknowledged jurisdiction. *See Seminole Tribe of Florida*, 116 S. Ct. at 1130 (distinguishing between "substantive rules of law" and "jurisdiction"). Given the expressly "limited" nature of the questions posited, we do not address this question

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[11] The Court has authority to transfer original petitions to an appropriate lower federal court. 28 U.S.C. § 2241(b).

further. *See id.* at 1126 n.10; *Matsushita Electric Industrial Co. v. Epstein*, 116 S. Ct. 873, 880 n.5 (1996) (refusing to permit even respondents to expand the scope of the writ of certiorari).

If, however, one assumes that the 1996 Act eliminates both the habeas and certiorari jurisdictions of this Court in successive petition cases, then the question of congressional power to regulate the Court's appellate jurisdiction is directly drawn into question.

Relevant sources and materials are collected in Hart and Wechsler's *The Federal Courts and the Federal System* 365-70 (Richard H. Fallon et al. eds., 4th ed. 1996) ("Hart & Wechsler"). The available historical materials provide no real help. The exceptions clause[12] was added by the Committee of Detail but not discussed in the constitutional convention.[13] *See* Raoul Berger, *Congress and The Supreme Court* 285-96 (1969). One commentator has argued that the clause was designed to deal exclusively with appellate review of jury fact finding.[14] Another

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[12] *See* U.S. Const. art. III, § 2, cl. 2, ("the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with *such Exceptions, and under such Regulations as the Congress shall make*" (emphasis added)).

[13] "The important provision that the appellate jurisdiction should be subject to exceptions and regulations by Congress was contained in none of the plans. It is foreshadowed in Randolph's draft for the Committee of Detail and then appears in a later draft in Wilson's handwriting in substantially the form in which the committee reported it. There was no discussion in the Convention." Hart & Wechsler, *supra* at 180.

[14] Henry J. Merry, *Scope of Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 Minn. L. Rev. 53, 58-69 (1962).

insists that, closely analyzed, the drafting process discloses that the provision simply authorized congressional procedural rules for this Court's jurisdiction.[15] From the very beginning, however, legislation concerning the Court's appellate jurisdiction has never reflected such a limited conception of congressional authority.[16] Nor have this Court's cases.

In addition to constraints on Congress' power that are internal to Article III, it is quite apparent that provisions external to that Article, such as the Bill of Rights and the Fourteenth Amendment, preclude any concept of unlimited congressional power to regulate jurisdiction. Congress could not amend 28 U.S.C. § 1257, for example, to preclude petitions by persons of a certain nationality or race. William W. Van Alstyne, *A Critical Guide to Ex parte McCardle*, 15 Ariz. L. Rev. 228, 263 (1973). That having been said, however, the outer boundaries of congressional regulatory authority present complex and troublesome issues. *See United States v. Klein*, 80 U.S. (13 Wall.) 128, 144-47 (1871) (invalidating jurisdictional limitation on this Court's appellate authority).

Especially in situations such as this in which history cannot supply the entire answer, the Constitution must be

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[15] Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. Pa. L. Rev. 741, 779-86, 794-95 (1984).

[16] For a long period the Supreme Court did not have the full range of its potential appellate jurisdiction. State court decisions sustaining federal claims could not be reviewed until 1914 and appeals were not allowed in federal criminal cases. But the latter defect was only a matter of form, because the "original" writ of habeas corpus was used for that purpose.

read as a whole, so as to make sense of all its parts. And the "case . . . must be considered in light of our whole experience and not merely in that of what was said a hundred years ago." *Missouri v. Holland*, 252 U.S. 416, 433 (1920).[17]

This Court's cases have viewed the Constitution as essentially neutral about the existence of the "inferior" federal courts. But that is decidedly not the case with respect to this Court. The Constitution itself mandates the existence of "one supreme Court," U.S. Const. art. III, § 1, and provides for its jurisdiction, *id.* § 2, cl. 2. At the least, this means that the exceptions clause cannot be read so as to impair this Court's "essential role . . . in the constitutional plan."[18] Such a conception of the Court's authority

[17] This Court recently acknowledged the limitations of historical analysis. In *Markman v. Westview Instruments, Inc.*, 116 S. Ct. 1384, 1389-93 (1996), a unanimous Court found the historical evidence of the role of a jury in a patent cases inconclusive, and then proceeded to examine other sources including historical development. That approach applies equally here.

[18] Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1365 (1953). Responding to the claim that "the appellate jurisdiction of the Supreme Court is entirely within congressional control," Hart wrote:

> You read the *McCardle* case for all it might be worth rather than the least it has to be worth, don't you?
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> It's not impossible for me to lay down a measure. *The measure is simply that the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan. McCardle*, you will remember, meets that test. The circuit courts of the United States were still open in habeas corpus, and the Supreme Court itself could still entertain petitions for the writ which were filed with it in the first instance.

Id. at 1364-65 (emphasis supplied). Professor Hart's treatment of this issue is, of course, the classic one. Although others have proposed broader limitations on Congress' power, Hart's rule comes from the Court's cases, *see, e.g., Principality of Monaco v. Mississippi*, 292 U.S. 313, 328-29 (1934) (discussed *infra*), and is no broader than necessary to resolve this case.

must be taken as "inherent in the constitutional plan." *Principality of Monaco v. Mississippi*, 292 U.S. 313, 328-29 (1934). *See Seminole Tribe of Florida*, 116 S. Ct. at 1128 (" 'Behind the words of the constitutional provisions are postulates which limit and control.' " (quoting *Principality of Monaco*, 292 U.S. at 323)).

This standard assuredly contains a certain amount of indeterminacy, but as this Court's decision in *United States v. Lopez*, 115 S. Ct. 1624 (1995), makes plain, that quality is by no means an insuperable objection when what is at stake is the relationship of the central organs of our federal system. *See id.* at 1634. ("These are not precise formulations, and in the nature of things they cannot be.") The standard is, however, neither novel nor unique. It was, for example, the foundation of the Court's analysis in *Principality of Monaco*, explaining why state sovereign immunity was no bar to a suit by the United States, and in *Seminole Tribe of Florida*, explaining why the Eleventh Amendment did not exhaust the content of state sovereign immunity. Likewise when the Court concluded that Congress lacked the authority to commandeer state regulatory and legislative processes, *New York v. United States*, 505 U.S. 144, 176 (1992), it did so on the avowed

premise that any such congressional action would compromise the essential role of the states in the constitutional order. *Id.* at 167-69. The Court has been guided by a similar standard in ensuring that there be no interference with the essential role of the President. *See, e.g., United States v. Nixon*, 418 U.S. 683 (1974).

The indeterminacy concern is considerably avoided, moreover, because of the two historically critical features of the Court's constitutional function that are described in Point One: the crucial role of the "supreme Court" in the exposition of the meaning of the Constitution, and the Court's long entrenched function of determining whether constitutionally valid norms have been applied to persons deprived of their liberty.

If the Act were read to bar all review by this Court, it would offend both those principles. The Act would, in effect, establish not "inferior" federal courts but rather a multitude of three-circuit-judge "supreme Courts" in cases of successive petitions. This would impair the Court's authority to ensure uniformity in the construction of constitutional law. What is more, it would do so in a particularly sensitive area, one traditionally reached by the writ of habeas corpus, concerning persons who are in custody and who assert a claim that their confinement is the result of constitutionally invalid rulings or procedures.[19] We submit that when those two circumstances

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[19] *See, e.g., Harris v. Nelson*, 394 U.S. 286, 290-92 (1969) (citation omitted):

> The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action. Its pre-

coexist, Congress cannot eliminate the appellate jurisdiction of this Court. We need not go further and argue that if the complaint is that a government benefit has been unconstitutionally denied, this Court's appellate jurisdiction cannot be restricted. *See Webster v. Doe*, 486 U.S. 592, 603 (1988). But with respect to deprivations of liberty, we insist otherwise, and that claim extends to second petitions.[20]

Two successive petition cases recently reviewed by this Court, *Schlup v. Delo*, 115 S. Ct. 851 (1995), and *Sawyer v. Whitley*, 505 U.S. 333 (1992), show that such cases fall within this principle. They demonstrate the importance of the Court's role as the supreme expositor of the meaning

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> eminent role is recognized by the admonition in the Constitution that: 'The Privilege of the Writ of Habeas Corpus shall not be suspended. . . . ' The scope and flexibility of the writ – its capacity to reach all manner of illegal detention – its ability to cut through barriers of form and procedural mazes – have always been emphasized and jealously guarded by the courts and lawmakers. . . .
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> * * *
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> There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law.

[20] This is, however, not to deny that abuses of the writ can be regulated.

of the Constitution and its especial importance in determining whether valid norms have been applied in adjudicating the constitutional claims of individuals deprived of liberty.

Suppose that Schlup's case had arisen after the 1996 statute, so that, instead of affirming the dismissal of his second petition, a panel of the Court of Appeals of the Eighth Circuit had denied him leave to file it. If this Court lacked any jurisdiction to review that denial, Lloyd Schlup would be dead today, even though he had sufficiently pleaded then – and has successfully proven since – that he was "actually innocent" of the capital murder he was convicted of committing. He would be dead because the Court could not review the erroneous legal determinations of the court below.

Schlup had informed the Court of Appeals that the constitutional violation his successive petition challenged " 'probably resulted in the conviction of one who is actually innocent' " because "it [was] more likely than not that no reasonable juror would have convicted him in light of the . . . evidence" that the violation kept from the jury. *Schlup*, 115 S. Ct. at 867 (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). Without disagreeing, the Eighth Circuit nonetheless dismissed the petition, concluding that the stiffer, "clear and convincing" standard of "actual innocence" in *Sawyer v. Whitley*, 505 U.S. 333 (1992), applied and that Schlup had not met it. *Schlup v. Delo*, 11 F.3d 738, 740-41 (8th Cir. 1993). This Court reversed, reaching three conclusions: (1) Because Schlup demonstrated his actual innocence, he had a right to file a second petition. *Schlup*, 115 S. Ct. at 869. (2) The court of appeals had misread the Court's decisions in *Carrier* and

Sawyer when it had applied the rule of the latter and not the former case. *Id.* at 865-67. (3) The court of appeals additionally had "erroneous[ly] appli[ed]" the *Sawyer* standard in a way that significantly undermined both the *Carrier* and the *Sawyer* standards. *Id.* at 867, 869. After extensive hearings on remand, the district court agreed that " 'it is more likely than not that no reasonable juror would have convicted [Schlup] in light of the [extensive eyewitness] evidence' " of his innocence that his constitutionally ineffective lawyer had failed to discover. *Schlup v. Delo*, 912 F. Supp. 448, 455 (E.D. Mo. 1995); see *Schlup v. Bowersox*, No. 4:92CV443 JCH, ___ F. Supp. ___, (E.D. Mo. May 2, 1996).

Recently, the Court held that forcing to trial a defendant who "is more likely than not incompetent" "offends a principle of justice . . . [so] deeply 'rooted in the traditions and conscience of our people' " that it violates Due Process. *Cooper v. Oklahoma*, 116 S. Ct. 1373, 1377, 1380 (1996) (quoting *Medina v. California*, 505 U.S. 437, 445 (1992)). Surely, if our most deeply rooted legal principles are offended by the mere "risk of an erroneous determination" of guilt that attends the trial of a man who "probably" cannot help competent counsel defend him, *id.* at 1381, they also are offended when it is "more probable than not" that an unconstitutionally incompetent lawyer has engineered the conviction and condemnation of a man who is "actually innocent." *See, e.g., Schlup*, 115 S. Ct. at 866 ("The quintessential miscarriage of justice is the execution of a person who is entirely innocent."); *Brecht v. Abrahamson*, 507 U.S. 619, 652 (1993) (O'Connor, J., dissenting) ("If there is a unifying theme to this Court's habeas jurisprudence, it is that the ultimate

equity on the prisoner's side – the possibility that an error may have caused the conviction of an actually innocent person – is sufficient by itself to permit plenary review of the prisoner's federal claim." (citing cases)). And just as surely, were Congress irrevocably to keep the Court from articulating principles of justice so deeply rooted as the precept that constitutional error should not result in sending innocent men to their deaths, the Court's "essential role" would be "destroy[ed]." Hart, *supra* note 18, at 1365.

Sawyer illustrates a different, but no less significant, way in which keeping the Court from considering denials of successive petitions would impair its constitutionally essential role. Before the grant of certiorari in *Sawyer*, the various courts of appeals had read this Court's precedents to compel widely divergent formulations for adapting the "actual innocence" test to capital-sentencing claims. *See Sawyer*, 505 U.S. at 343-44 & nn.10-11. The disparity in circuit court standards prompted this Court's grant of certiorari, and the difficult choice among those standards took up the bulk of its opinion. *Id.* at 343-47. Had Sawyer instead sought review after a court of appeals denied permission to file a successive petition, and had this Court's door been barred, the *potentially permanent* result would have been that condemned inmates were being denied leave to file habeas petitions in Mississippi, Louisiana and Texas that condemned inmates in Indiana, Arkansas, and Arizona were being granted leave to file. *Cf. Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816) ("If there were no revising authority [in the Supreme Court] to control . . . jarring and discordant [lower court] judgments, and harmonize

them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states. . . . The public mischiefs that would attend such a state of things would be truly deplorable.")[21]

It is instructive to consider the combined effect of these hypothesized results in light of the substantive standard that courts of appeals must apply to proffered successive petitions under the 1996 statute.[22] That standard is *Sawyer*'s standard, now applied to guilt-innocence claims instead of the capital-sentencing claims to which *Sawyer* applied it. Thus the courts of appeals will now be deciding whether or not a claim tendered by a successive habeas petition demonstrates "by clear and convincing evidence" that, "but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense"; and it is only in cases where a

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[21] Consider also the Court's grant of certiorari to review the denial of a successive petition in *Herrera v. Collins*, 506 U.S. 390 (1993). The Court granted certiorari to resolve an important question of *constitutional* law that had deeply split the circuit courts but that almost never arises except in habeas – and often *successive* habeas – cases. *Compare, e.g., Evans v. Muncy*, 916 F.2d 163, 166 (4th Cir.), *cert. denied*, 498 U.S. 927 (1990) (no constitutional right based on newly discovered evidence of innocence) *with, e.g., Sanders v. Sullivan*, 900 F.2d 601, 606-07 (2d Cir. 1990) (broad constitutional right based on newly discovered evidence of innocence).

[22] *See* 28 U.S.C. § 2244(b)(2)(B)(ii) (successive petitioner must show that "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense").

court of appeals has arguably "misapplied"[23] this straitened standard that an occasion will arise for exercise of the Court's appellate jurisdiction to issue an original writ of habeas corpus in a successive-petition case. On the supposition that Congress has abrogated that jurisdiction and compelled the Court to sit by silently when such egregious miscarriages of justice on the one hand and inter-circuit disarrays on the other occur and persist, it is hardly doubtful that the Supreme Court of the United States has been shorn of power to fulfill its "essential role . . . in the constitutional plan."

III. The Suspension Clause Has No Independent Bearing On The Jurisdictional Issue Now Before The Court.

The third question posed for briefing by the Court's May 3 order is "Whether application of the Act in this case is a suspension of the writ of habeas corpus in violation of Art. I, § 9, clause 2 of the Constitution." The answer to that question is framed by the proceedings had below.

We do not believe that the Habeas Corpus Suspension Clause provides any basis for invalidating the "application of the Act in this case" independently of

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[23] *See Schlup*, 115 S. Ct. at 867-69. This paragraph assumes *arguendo* that the substantive standard of new subsection 2244(b)(2)(B)(ii) is constitutional. If that is so, its stringency heightens the injustices which would result from its misapplication; if it is not, that is because the injustices which flow from misapplications of the *Schlup* and *Sawyer* standards are themselves at the outer limits of constitutional tolerability.

Article III of the Constitution. Because of the way in which the 1996 statute was actually applied by the Eleventh Circuit panel below and remains available to be applied by this Court, a separate Suspension Clause argument would reduce to the claim that the Clause forbids Congress to route judgments of the merits of second-or-successive petitions to a three-judge panel of a Court of Appeals instead of to a single district judge in the first instance. We cannot conscientiously contend that it does. The Suspension Clause strongly reinforces what was said about Article III in Part II of this brief, but the Clause can bear upon the "application of the Act in this case" only in that manner and not as a distinct ground of constitutional invalidity.

The 24-page opinion delivered by the Court of Appeals in denying Mr. Felker leave to file a second habeas petition in the district court is the key to this conclusion. What the Court of Appeals did in that opinion was to examine each of the federal constitutional claims alleged in the proffered second petition and to hold, in the alternative, that (1) the claim was not cognizable in a second habeas petition either under the 1996 Act or under the less demanding standards for second-and-successive petitions that predated the statute – for reasons that were virtually identical under the two regimens – and (2) that the claim was substantively wrong on the record and the law. Thus, the only practical sense in which the 1996 Act was applied to the case by the Court of Appeals panel was that the form of proceeding in which the court announced these rulings was an application-for-leave-to-file-a-second-habeas-petition-in-the-district-court rather than an appeal from a district court

order denying relief or denying a stay of execution on a second habeas petition. In these circumstances – and with due regard for the Court's uniform practice of declining to issue advisory opinions on the Constitution and the limited scope of the briefing that it ordered on May 3 – the issue of the constitutionality of the "application of the Act in this case" becomes simply whether the Suspension Clause dictates that one instead of three judges rule upon the merits of a successive habeas petition at the outset.[24]

To be sure, the Court of Appeals decided the merits incorrectly. That is why the corrective appellate jurisdiction of this Court is necessary and should be exercised in the case, and that is why we have argued in Part II above that, if Congress implicitly and implausibly curtailed that appellate jurisdiction, the curtailment violates Article III. The Suspension Clause is a textual embodiment of the importance and historicity of the writ of habeas corpus and, in that light, bears upon the question whether an attempted abrogation of this Court's jurisdiction to review gross miscarriages of justice by a Court of Appeals' denial of habeas corpus relief would be consistent with the Court's Article III integrity.[25] But to analyze

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[24] While Petitioner continues to maintain that the circuit court violated rather than applied the Act, *see* letter from counsel of record to the deputy clerk of this Court dated May 2, 1996, this contention is not pertinent to the current questions presented.

[25] It is for this reason that in Parts I and II above we have adverted to this Court's repeated reading of the Suspension Clause as "testif[ying] to the importance of the writ of habeas corpus," *Kelly v. Robinson*, 479 U.S. 36, 48 n.9 (1986), and as recognizing that the jurisdiction conferred by 28 U.S.C. § 2241

such a question in terms of whether the 1996 Act "suspended" the privilege of the writ in Mr. Felker's case would distort both the question and the Suspension Clause beyond recognition.

CONCLUSION

The Court has jurisdiction. It should now permit the parties to address the issue of the proper exercise of that jurisdiction on the record of Mr. Felker's case. The questions to which the present brief were limited by the Court's order of May 3 do not address the standards that should govern original habeas petitions in cases where such petitions are the only remedy available to a condemned inmate in the courts of the United States, nor whether those standards encompass Mr. Felker's claims of constitutional error that have doomed him to die for a crime which he did not commit. He should be heard, and the Court should be fully advised on those subjects, while

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"implements the constitutional command that the writ . . . be made available," *Jones v. Cunningham*, 371 U.S. 236, 238 (1963). *See, e.g., supra* note 19.

the stay of execution which it granted on May 3 remains effective.

Respectfully submitted,

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No. 95-8836 (6)

In The

Supreme Court of the United States

October Term, 1995

ELLIS WAYNE FELKER,

Petitioner,

v.

TONY TURPIN, Warden Georgia Diagnostic and Classification Center,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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QUESTIONS PRESENTED

1.

Whether Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996 (the Act), and in particular Section 106(b)(3)(E), 28 U.S.C. § 2254(b)(3)(E), is an unconstitutional restriction of the jurisdiction of this Court.

2.

Whether and to what extent the provisions of Title I of the Act apply to petitions for habeas corpus filed as original matters in this Court pursuant to 28 U.S.C. § 2241.

3.

Whether application of the Act in this case is a suspension of the writ of habeas corpus in violation of Art. I, § 9, clause 2 of the Constitution.

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STATEMENT OF THE CASE

Petitioner, Ellis Wayne Felker, was indicted on May 17, 1982, in the Superior Court of Houston County, Georgia, for the murder, rape, aggravated sodomy, false imprisonment and robbery of Evelyn Joy Ludlam. Following the close of the evidence at the guilt-innocence phase of trial, a directed verdict was granted as to the robbery charge. Petitioner was found guilty of the remaining charges and received a life sentence for rape, a twenty-year sentence for aggravated sodomy, to be served consecutively to the rape sentence, and a ten-year sentence for the offense of false imprisonment, to run concurrently with the sentence imposed for rape. At the sentencing phase, the jury found the existence of two statutory aggravating circumstances, i.e., that the offense of murder was committed while the offender was engaged in another capital felony, to wit: rape; and that the offense was outrageously or wantonly, vile, horrible or inhuman in that it involved torture or depravity of mind. *See* O.C.G.A. § 17-10-30(b)(2) and (b)(7). Petitioner's amended motion for new trial was denied on July 20, 1983.

Petitioner appealed to the Supreme Court of Georgia which court affirmed his convictions and sentences in *Felker v. State*, 252 Ga. 351, 314 S.E.2d 621 (1984). Petitioner's motion for rehearing was denied on March 29, 1984. Petitioner's petition for a writ of certiorari filed in this Court was denied on October 1, 1984, and rehearing was denied on November 26, 1984. *Felker v. Georgia*, 469 U.S. 873, *reh'g denied*, 469 U.S. 1067 (1984).

Petitioner then filed a state habeas corpus petition in the Superior Court of Butts County, Georgia on December 17, 1984. Proceedings were held on March 25, 1985, March 3, 1986, March 30, 1987 and July 16, 1990. The state habeas corpus court denied Petitioner relief on August 9, 1990. Petitioner's application for a certificate of probable cause to appeal from the denial of state habeas corpus relief was denied by the Supreme Court of Georgia on September 3, 1991. Petitioner then filed a petition for a writ of certiorari in this Court on November 1, 1991, which was denied on January 21, 1992. *Felker v. Zant*, 502 U.S. 1064 (1992).

On April 12, 1993, Petitioner served by mail on counsel for Respondent Petitioner's first application for federal habeas corpus relief to be filed in the United States District Court for the Middle District of Georgia. The district court subsequently allowed the application to be filed, and it was stamped filed as of June 2, 1993. On June 9, 1993, the district court entered an order directing the Petitioner to amend his petition within thirty days "to include every alleged possible constitutional error or deprivation entitling petitioner to habeas relief in this court, failing which petitioner will be presumed to have deliberately waived his right to complain of any constitutional errors or deprivations other than those set forth in his habeas petition."

On January 26, 1994, the district court denied Petitioner federal habeas corpus relief. Petitioner filed a notice of appeal on February 23, 1994. The district court granted Petitioner's application for a certificate of probable cause to appeal on February 25, 1994.

Petitioner appealed the denial of federal habeas corpus relief to the United States Court of Appeals for the Eleventh Circuit. Following oral argument, the Circuit Court affirmed the denial of federal habeas corpus relief in *Felker v. Thomas*, 52 F.3d 907 (11th Cir. 1995). On Petitioner's petition for a rehearing and suggestion of rehearing *en banc*, the Eleventh Circuit addressed Petitioner's contentions, but extended the original panel opinion. *Felker v. Thomas*, 62 F.3d 342 (11th Cir. 1995). Petitioner then filed a petition for a writ of certiorari in this Court seeking review of the two opinions of the Eleventh Circuit. Certiorari was denied on February 20, 1996, and Petitioner's petition for rehearing was denied on April 15, 1996.

Petitioner's execution window was scheduled for May 2, 1996, through May 9, 1996. On April 29, 1996, Petitioner filed a motion for access to conduct a mental health evaluation of Petitioner and a second petition for state habeas corpus relief in the Superior Court of Butts County. Respondent filed a motion to dismiss this petition as successive under O.C.G.A. § 9-14-51 and for failure to state a claim as to certain issues.

On April 30, 1996, Petitioner filed an amended petition for a writ of habeas corpus, and Respondent filed an amended motion to dismiss the petition as successive under state law on May 1, 1996, prior to the hearing previously scheduled by the court in connection with Respondent's motion to dismiss. Following the hearing conducted on May 1, 1996, the state habeas corpus court found the challenge to the charge under *Cage v. Louisiana*, 498 U.S. 39 (1990), to be without merit and the remaining issues to be successive and subject to dismissal under

Georgia's successive petition rule. On May 2, 1996, the Supreme Court of Georgia denied Petitioner's application for a certificate of probable cause to appeal and denied Petitioner's motion for stay of execution.

On May 1, 1996, the State Board of Pardons and Paroles denied Petitioner's application for stay of execution and commutation of death sentence.

On May 1, 1996, Petitioner filed an "Application for Permission to File a Second Habeas Corpus Petition in the District Court and for Stay of Execution" in the United States Court of Appeals for the Eleventh Circuit. The Respondent Warden in that action lodged a response on May 1, 1996. On May 2, 1996, the Eleventh Circuit Court of Appeals denied Petitioner's application for permission to file a second petition for federal habeas corpus relief pursuant to Section 106(b)(3)(A) [28 U.S.C. § 2244(b)(3)(A)] of the new habeas corpus statute contained in Title I of the Antiterrorism and Effective Death Penalty Act of 1996; found Petitioner had not shown that he would be entitled to relief on his challenges to the constitutionality of the new Act because "he would not be entitled to any relief even under pre-Act law," *Felker v. Turpin*, No. 96-1077 (11th Cir. May 2, 1996); and denied Petitioner's motion for a stay of execution.

While Petitioner's application was pending in the Eleventh Circuit Court of Appeals, Petitioner filed a"Petition for Writ of Habeas Corpus, for Appellate or Certiorari Review of the Decision of the United States Circuit Court for the Eleventh Circuit, and for Stay of Execution." On May 3, 1996, this Court granted certiorari and a stay of execution and posed three questions to be

addressed by the parties. *Felker v. Turpin*, 64 U.S.L.W. 3740 (May 3, 1996).

SUMMARY OF THE ARGUMENT

The only way to preserve the integrity of the writ of habeas corpus is to protect it from abuse. With the passage of the Act of 1996, Congress has enacted legislation to deal with the ever-increasing number of petitions, new and creative forms of abuse and eleventh hour attempts to delay executions. This Court has expressed the same concerns in its recent federal habeas corpus decisions.

Section 106(b)(3)(E) is not an unconstitutional restriction on the jurisdiction of this Court. The Constitution permits Congress to restrict the jurisdiction of this Court in habeas corpus mattters and this Court has recognized this authority. This Court has specifically recognized and applied restrictions previously imposed by Congress on successive habeas corpus petitions.

The new Act is not inconsistent with the traditional approach this Court has taken concerning the parameters of 28 U.S.C. § 2241. The provisions of the new Act concerning initial applications for the writ are applicable to original applications filed under § 2241. This Court should not undermine its own efforts nor those of Congress to preserve the integrity of the writ by revitalizing an "anachronistic" writ of rare and extraordinary application.

Petitioner would not have been entitled to relief under the old law. Therefore, the Act's restrictions could

have no unconstitutional effect on him. On a broader scale, needed restrictions on successive petitions are not equivalent to a suspension of the writ.

ARGUMENT

I. INTERSECTION OF CONCERNS OF THIS COURT AND CONGRESS

Congress' thirty year silence has come to an end. No longer must this Court attempt to divine congressional intent to deal with ever-increasing numbers of petitions, new and creative forms of abuse, and eleventh hour attempts to delay executions.[1] The Antiterrorism and Effective Death Penalty Act of 1996 (the Act), recently passed by Congress and signed into law by the President

[1] Average time from crime to execution in Powell Committee case study was 106 months; analysis of cases from those states (Alabama, Florida, Georgia, Mississippi, and Texas) shows that 80% of the time spent in collateral litigation in death penalty cases occurs outside of state collateral proceedings. Ad Hoc Comm. on Fed. Habeas Corpus in Cap. Cases, Jud. Conf. of the U.S., Committee Report and Proposal, p. 8 (1989); "for the 10 year period from 1977-1987, the average elapsed time from the imposition of a capital sentence to execution was 77 months," U.S. Department of Justice, Bureau of Justice Statistics, Capital Punishment 1987, p. 9 (table 10) (1988) *quoted in Teague v. Lane*, 489 U.S. 288, 314, n.2 (1989). In 1985, state prisoners filed 8,534 federal habeas corpus petitions; in 1986, 9,045 such petitions were filed; by 1988, the number of such petitions was 9,880. Donald E. Wilkes, Jr., *Federal and State Post-conviction Remedies and Relief*, 522-523 (1992) (table cataloging data obtained from the Administrative Office of the United States Courts).

on April 24, 1996, is the culmination of a ten year legislative effort to address and resolve well-recognized problems within our system of federal habeas corpus review.[2] With the passage of this Act, Congress' concern with federal habeas corpus review has intersected with the concerns of this Court.

Paralleling Congress' recent legislative efforts to overhaul habeas corpus procedures, this Court has endeavored to bring into focus the appropriate scope of federal habeas corpus review, to simplify and clarify the procedures governing the writ, and to provide guidance to the lower courts. *See, e.g., Lonchar v. Thomas*, ___ U.S. ___, 116 S.Ct. 1293 (1996); *McCleskey v. Zant*, 499 U.S. 467 (1991). *See also Schlup v. Delo*, ___ U.S. ___, 115 S.Ct. 851 (1995); *Herrera v. Collins*, 506 U.S. ___ (1993); *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992); *Sawyer v. Whitley*, 505 U.S. ___, 112 S.Ct. 2514 (1992); *Coleman v. Thompson*, 501 U.S. 722 (1991); *Teague v. Lane*, 489 U.S. 288 (1989); *Kuhlmann v. Wilson*, 477 U.S. 546 (1986); *Barefoot v. Estelle*, 463 U.S. 880 (1983). For example, making reference to the history of

[2] Report 104-23, 104th Cong. 1st Sess., Effective Death Penalty Act of 1995, February 8, 1995; 137 Cong. Rec. S.3199-201 (Mar. 13, 1991); S. HRG. 101-1253, Hearings Before the Committee on the Judiciary, United States Senate, 101st Cong., 1st and 2nd Sess. on S.88, S.1757, and S.1760, November 1989 and February 1990, Serial No. J-101-49; S. Rep. No. 226, 98th Cong. 1st Sess. (1983) (earliest version of the act); H.R. 5269, 101st Cong., 2d Sess. (1990) (attempting to amend 28 U.S.C. § 2254(b)), *cited in McCleskey v. Zant*, 499 U.S. 467, 516 (1991); *Lonchar v. Thomas*, ___ U.S. ___, 116 S.Ct. 1293, 1303-1304 (1996) (listing bills introduced during the last ten years proposing a statute of limitations for federal habeas corpus petitions).

federal habeas corpus jurisprudence, the applicable statutes, and the Court's precedent, this Court dealt specifically with the handling of subsequent applications for federal habeas corpus relief in such cases as *Sawyer v. Whitley*, *McCleskey v. Zant*, and *Kuhlmann v. Wilson*.

It is readily apparent that specific components from this Court's decisions have been incorporated by Congress in the new Act. This fact, that the new Act is reflective of this Court's recent federal habeas corpus jurisprudence, was to be expected. As this Court noted in *McCleskey v. Zant*, its decision in *Price v. Johnston*, 334 U.S. 266 (1948), prompted congressional action with the enactment of 28 U.S.C. § 2244, a statute whose interpretation is involved in the instant case. *McCleskey v. Zant*, 499 U.S. at 483. Similarly, the Court in *McCleskey v. Zant* acknowledged that the enactment of 28 U.S.C. § 2244(b) and Rule 9 of the Rules Governing Section 2254 Cases was commonly accepted as having been a response to this Court's decision in *Sanders v. United States*, 373 U.S. 1 (1962). *McCleskey v. Zant*, 499 U.S. at 485. *See also Kuhlmann v. Wilson*, 477 U.S. at 469.

Just as *Price* and *Sanders* previewed the legislation ultimately enacted, Respondent submits that this Court's decisions in *Barefoot v. Estelle* and *McCleskey v. Zant* foreshadowed the 1996 Act as it relates to successive federal habeas corpus actions, particularly in the context of capital cases.

As this Court has repeatedly recognized, it should not exceed the congressional parameters of its federal habeas corpus jurisdiction. Most recently, in *Lonchar v. Thomas*, this Court recognized that there was considerable

debate about whether Rule 9(a) of the Rules Governing Section 2254 Proceedings "properly balances the relevant competing interests" but concluded that, "to debate the present rule's effectiveness is to affirm, not to deny, its applicability." *Id.*, 116 S.Ct. at 1301. Significantly, this Court in *Lonchar* noted that the congressional debate over the efficacy of the rule "reveals the institutional inappropriateness of amending the Rule, in effect, through an ad hoc judicial exception, rather than through congressional legislation or through the formal rule-making process." *Id.* The Act now before this Court for review is, after years of legislative efforts, the result of just such a process.

Respondent submits that the Act is simply the next logical step foreshadowed by this Court's precedent, as well as previous legislative attempts at redefining federal habeas corpus review. The Act addresses the continued need for a viable system of habeas corpus review while attempting to streamline certain of the procedural mechanisms contained in the present system. Additionally, the Act alleviates the unnecessarily burdensome caseloads while allocating legitimate cases and last minute requests for the review of successive petitions so that they may be most effectively resolved within the system.

II. THE SPECIFIED CODE SECTION OF THE 1996 ACT IS NOT AN UNCONSTITUTIONAL RESTRICTION OF THE JURISDICTION OF THIS COURT.

The first question posed by this Court to the parties is "Whether Title I of the Anti-Terrorism and Effective

Death Penalty Act of 1996 (the Act), and in particular Section 106(b)(3)(E), 28 U.S.C § 2244(b)(3)(E), is an unconstitutional restriction of the jurisdiction of this Court."

Section 106 is entitled "Limits on Second or Successive Applications" and reads, in pertinent part, as follows:

> (3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
>
> (B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
>
> (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.
>
> (D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.
>
> (E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

Section 106(b)(3), 28 U.S.C § 2244(b)(3).

Just as Congress in 1908 enacted the requirement in connection with initial applications for the writ that a petitioner make a showing in an application for a certificate of probable cause to appeal before being granted authority to proceed, Congress has now incorporated a similar concept requiring a petitioner make an initial showing before being allowed to file a successive petition. In fact, this Court in *Barefoot v. Estelle* noted that the certificate of probable cause requirement had specifically been enacted to deal with the problem of "the increasing number of frivolous habeas corpus petitions challenging capital sentences which delayed execution pending completion of the appellate process." *Barefoot*, 463 U.S. at 892, n.3. Thus, the concept of requiring a threshold showing is not novel, nor is the utilization of a threshold showing to attempt to ferret out frivolous petitions filed on the eve of execution.

Under *Sanders v. United States*, and subsequently under Rule 9(b) of the Rules Governing Section 2254 Proceedings, it was formerly the obligation of a federal district court to initially determine whether a petitioner was entitled to pursue a second or subsequent application for federal habeas corpus relief. Congress has now delegated this responsibility to the circuit courts. The present discretion accorded to the federal circuit courts is similar to that discretion contained in the previous 28 U.S.C. § 2244(b) which provided that "a district court may entertain" a second application for federal habeas corpus relief but that these applications "need not be entertained." Rule 9(b) of the Rules Governing Section 2254 Proceedings provided a list of circumstances under

which second or subsequent applications "may be dismissed." Circuit courts were already reviewing district court judgments as to whether second or subsequent petitions constituted an abuse of the writ, in the course of appellate review. They are now being required to perform this evaluation as an initial matter in connection with subsequent applications.

Under the prior law, once abuse was pled, a petitioner was required to justify proceeding on a second or subsequent proceeding. Under the 1996 Act, Congress made a purely procedural change that this justification be made not to the district court, but to the circuit courts.

The decision to vest discretion with the circuit courts, by virtue of these procedural changes, as to whether to allow a second or subsequent federal habeas corpus petition to be filed is reasonable. In *Sanders*, this Court found it appropriate to vest discretion in the federal district court to make such a decision, commenting that the resolution of successive applications should be "addressed to the sound discretion of the federal trial judges." *Sanders*, 373 U.S. at 18. The Court concluded, "We are confident that this power will be soundly applied." *Id.* at 19. In *Delo v. Stokes*, 495 U.S. 320, 325 (1990), the Court also expressed confidence in the lower courts' abilities to dispose of successive writs of habeas corpus and concluded that, "[t]he Court of Appeals similarly is due considerable deference." *See, e.g., Straight v. Wainwright*, 476 U.S. 1132 (1986) (finding no basis for concluding that the district court abused its discretion); *Kemp v. Smith*, 463 U.S. 1344, 1345 (1983) (denying Georgia's application to vacate a last minute stay of execution ordered by the Court of Appeals). Therefore, the shift from the district

courts to the circuit courts is not at odds with this Court's expressed confidence in the decision-making abilities of the lower federal courts nor their experience in making these decisions.

In addition to providing that the circuit courts now determine whether a federal district court should entertain a successive application for federal habeas corpus relief, the Act also provides that the decision of the circuit court, in this case the Eleventh Circuit, denying an authorization to file a subsequent application shall not be the subject of a petition for rehearing or a petition for a writ of certiorari to this Court. Section 106(b)(3)(E); 28 U.S.C. § 2244(b)(3)(E). This statutory scheme is a workable solution to what has become a burdensome caseload for this Court, especially involving last minute applications for federal habeas corpus relief filed by capital litigants. *See Sawyer v. Whitley*, 112 S.Ct. at 2520, n.7. Allowing the circuit courts to winnow out frivolous successive cases frees this Court to focus on cases involving fundamental constitutional principles of widespread application. Moreover, Congress' action to restrict the availability of successive petitions comports with important constitutional principles enunciated by this Court.

The jurisdiction of this Court was established in Article III, Section 2, Clause 2 of the United States Constitution, which reads:

> In all Cases Affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact,

with such exceptions, and under such Regulations as the Congress shall make.

This Court has interpreted "appellate jurisdiction" as used in this constitutional provision to include habeas corpus actions. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 100 (1807) (finding habeas corpus action before it was an exercise of its appellate jurisdiction, as Court was reviewing decision which had resulted in imprisonment of the petitioner); *Ex parte Siebold*, 100 U.S. 371, 374-375 (1880) (finding that Court's exercising of its habeas corpus jurisdiction is an exercise of its appellate jurisdiction in all cases not falling within its original jurisdiction and where exceptions to appellate jurisdiction have not been made). *See generally Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

In *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868), this Court discussed the source of its appellate jurisdiction and concluded that "the appellate jurisdiction of this court is not derived from acts of Congress. It is, strictly speaking, conferred by the Constitution. But it is conferred 'with such exceptions and under such regulations as Congress shall make.' " *Ex parte McCardle*, 74 U.S. at 512-513. In *Ex parte McCardle*, this Court reviewed Congress' decision to repeal this Court's appellate review in habeas corpus cases, and this Court found itself to be bound by this congressional action.

By way of further example, in 1868, Congress amended the Habeas Corpus Act of 1867, which is generally recognized by commentators to have extended the writ of habeas corpus to state prisoners, to repeal the exercise by the Supreme Court of any jurisdiction on

appeals from the circuit courts. March 27, 1868, ch. 34, § 2, 15 Stat. 44. Thus Congress' removal of appellate jurisdiction from this Court, as in the 1996 Act for the denial of authorization to file second or successive applications, Section 106(b)(3)(E), 28 U.S.C. § 2244(b)(3)(E) is not unprecedented.

Additionally, this Court enforces a jurisdictional time limitation on its certiorari jurisdiction in civil cases established by Congress in 28 U.S.C. § 2101(c). *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990). *See also Williams v. Kemp*, 489 U.S. 1094 (1989) (dismissing petition for a writ of certiorari for want of jurisdiction). Moreover, this Court's own Rules state: "A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons" Supreme Court Rule 10.

By declaring that as to decisions whether to permit filing of successive applications for federal habeas corpus relief, no review of that decision in the circuit courts or this Court shall be had, Congress has delineated a specific exception to the Court's jurisdiction, which this Court has acknowledged is within the power of Congress under the Constitution. Further, this specific exception is narrow, as it withholds jurisdiction only to review the determination whether authorization to file a successive petition is warranted. In successive applications where leave to file is authorized by the circuit courts, regular appellate proceedings will take place, including any appeal to the court of appeals, rehearing in the court of appeals, and certiorari petitions filed in this Court.

In fact, this Court has validated as constitutional a statutory scheme which eliminated federal habeas corpus actions in their entirety. *See Swain v. Pressley*, 430 U.S. 372 (1977). The statutory scheme reviewed by this Court in *Swain* and found to be constitutional, also contained a provision specifically prohibiting the filing of successive petitions. D.C. Code Ann. § 23-110(e), *cited in Swain*, 437 U.S. at 374, n.2.

In the Act of 1996, Congress left intact certiorari jurisdiction as to direct appeal from the state criminal proceeding, the state habeas corpus proceeding and the initial federal habeas corpus proceedings. *See* 28 U.S.C. § 1254(1). Similarly, this Court noted in *Swain*, under the District Court statutory scheme accepted in that case, an individual tried under the District Court statute would have two opportunities to seek review before this Court: "First, after affirmance of his conviction by the District of Columbia Court of Appeals, and second, after a judgment of that court resulting in the denial of relief under § 23-110." *Id.* at 382, n.16. Petitioner has already sought this Court's review by certiorari on three prior occasions and still retains the opportunity to file a fourth petition for certiorari from the most recent decision denying him state habeas corpus relief. Under the Act of 1996, Petitioner merely lacks the ability to seek a writ of certiorari to review an order of the Eleventh Circuit Court of Appeals finding no basis upon which to authorize the filing of a second petition.

The only way to preserve the integrity of the writ is to protect it from abuse. The deluge of last minute frivolous litigation impairs this Court's ability to function by

making it impossible for the Court to find those "exceptional cases" containing meritorious claims. Congress' de minimis restriction of the ability to seek certiorari in a frivolous successive petition is not violative of the Constitution.

III. EXTRAORDINARY RELIEF SHOULD REMAIN EXTRAORDINARY.

In question two, this Court asks "Whether and to what extent the provisions of Title I of the Act apply to petitions for habeas corpus filed as original matters in this Court pursuant to 28 U.S.C. § 2241." The answer to this question depends on the extent to which the Court continues to adhere to the traditional parameters of 28 U.S.C. § 2241 and its willingness to effectuate the clear congressional intent of the new Act.

The pertinent portions of 28 U.S.C. § 2241 read as follows:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts, and any circuit judge within their respective jurisdictions. . . .
>
> (b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

This Court's own rules provide the following guidance:

> A petition seeking a writ of habeas corpus shall comply with the requirements of 28 U.S.C. §§ 2241 and 2242, and in particular with the provision in the last paragraph of § 2242, which requires a statement of the "reasons for not making application to the district court of the district in which the applicant is held." If the relief sought is from the judgment of a state court, the petition shall set out specifically how and where the petitioner has exhausted available remedies in the state courts or otherwise comes within the provisions of 28 U.S.C. § 2254(b). To justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court. This writ is rarely granted.

Supreme Court Rule 20.4(a).

The direct writ has historically been treated as "extraordinary," "limited," "sparingly used," and "rarely granted." Supreme Court Rule 20.4(a); D. Oakes, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 Sup. Ct. Rev. 153, 154 n.4. Rarely has this Court even allowed such writs to proceed. Instead, this Court has customarily transferred such writs to the appropriate district court, as suggested in 28 U.S.C. § 2241(b). Even more rarely has this Court granted relief under this statute. "This Court does not, absent exceptional circumstances, exercise its jurisdiction to issue writs of habeas corpus

when an adequate remedy may be had in a lower court." *Dixon v. Thompson*, 429 U.S. 1080 (1977) (citing *Ex parte Abernathy*, 320 U.S. 219 (1943) and *Ex parte Tracy*, 249 U.S. 551 (1919)). In fact, it appears that this Court has not granted relief on a petition for habeas corpus filed directly with the Court since 1925. *Oakes*, 1962 Sup. Ct. Rev. at 154 n.4 (citing *Ex parte Grossman*, 267 U.S. 87 (1925)).

Sections 101-105 of the 1996 Act governing initial habeas corpus actions are clearly intended to apply to any initial (as opposed to successive) application for the writ, regardless of where the application is filed, even though there is no mention of 28 U.S.C. § 2241 in the Act. By the same token, if this Court were to accept such a direct writ for filing but decide, as the Court customarily does under 28 U.S.C. § 2241(b) that the application should be transferred to the federal district court, then the action would also be governed by Sections 101-105 of the new Act.

Ever mindful of this Court's case or controversy requirement, Respondent does not attempt to address any additional impact of the other portions of the new Act relating to initial applications for the writ on applications filed pursuant to 28 U.S.C. § 2241, as Petitioner did not file his first application pursuant to the new Act, but rather sought authorization to file his second petition under the new Act's provisions. *See* United States Constitution, Art. III, § 2. Instead, Respondent will address the impact of the new Act on 28 U.S.C. § 2241 cases in the context of successive applications.

In this regard, Congress has determined as a policy matter that there should be changes in how successive applications are handled in order to curb abuses of the writ. One change made by Congress is the authorization to file provision of Section 106, 28 U.S.C. § 2244 (hereinafter referred to as ATF), allowing frivolous petitions to be culled and conserving the judicial energies and resources of this Court and the federal district courts. There is no corresponding ATF provision for direct writs under § 2241. Therefore, if this Court permits successive petitioners to file direct writs rather than proceeding under the ATF procedure in the new Act, there results a circumvention of the new statutory scheme so as to nullify its provisions. To allow such circumvention would have the practical effect of increasing this Court's workload by encouraging successive petitioners to file direct writs. This was obviously not Congress' intention.

If this Court permitted the new successive petition provisions to be circumvented in contravention of Congress' intent by allowing petitioners to file original applications in this Court without first going through the authorization to file procedure (hereinafter referred to as ATF), this would nullify the new provisions. A petitioner would have every incentive to bypass the ATF procedure of the new Act and file a successive petition directly in this Court.

There is a particular incentive in the context of capital cases to forum shop, for what this Court has termed "obvious reasons." *Spenkelink v. Wainwright*, 442 U.S. 901, 906 (1979). Tolerating the use of the direct writ in the successive petition context would permit petitioners to

engage in the type of "forum shopping" of which this Court disapproved in *Spenkelink*. *Id*.

This Court should not permit successive petitioners to use this Court as a "fallback" when they have already litigated their claims in federal collateral proceedings but are simply unsatisfied with the results. This would transform the direct writ into yet another appeal to this Court from the denial of relief by a federal court in the first instance.

It would be an anomaly for Congress to create an Act partially intended to decrease the workload of this Court and expedite the consideration of successive petitions while, simultaneously, this Court revitalizes a writ which has been termed an "anachronism"[3] so as to virtually guarantee a never ending flood of petitions and institutionalize delay. Such an anomaly would put this Court at cross-purposes with Congress.

Policy concerns counsel even more strongly against allowing the extraordinary "original" writ to be used in an eleventh hour attempt to obtain a stay of execution. Neither the Court nor Congress would wish to exacerbate last minute capital litigation by institutionalizing another avenue for delay. If capital litigants perceive that this option is available by means of this Court's construction of the Act of 1996, it is beyond dispute that all capital litigants will avail themselves of this opportunity.

It is possible for the new Act and 28 U.S.C. § 2241 to peacefully coexist in light of the extraordinary nature of

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[3] D. Oakes, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 Sup. Ct. Rev. 153, 206.

the 28 U.S.C. § 2241 writ, as interpreted in such cases as *Dixon v. Thompson*. As long as this Court continues to adhere to its customary view of the parameters of 28 U.S.C. § 2241, to use its authority sparingly, and to respect the role and exercise of discretion of the lower courts, as Congress intended in enacting the new provisions, no conflict will arise.

Therefore, Title I of the Act applies to initial, direct petitions for writs of habeas corpus, whether this Court transfers the petition to the district court or retains jurisdiction. This Court should not apply the Act to successive, direct petitions to the extent it would expand this Court's historical, restrictive view of direct writs to avoid conflicting with congressional intent as reflected in the new statutory scheme.

IV. THE SUSPENSION CLAUSE DOES NOT REQUIRE PERPETUAL REVIEW

Finally, this Court has posed the question "Whether application of the Act in this case is a suspension of the writ of habeas corpus in violation of Art. I, § 9, clause 2 of the Constitution." This provision of the Constitution reads as follows:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

This Court phrased its question specifically in terms of suspension of the writ "in this case."[4] In considering Petitioner's application for authorization to file a second federal habeas corpus petition, the Eleventh Circuit Court of Appeals addressed Petitioner's challenge to the constitutionality of the Act as applied to him. The Eleventh Circuit concluded that there was no unconstitutional impact upon Petitioner due to the passage of the Act by finding that Petitioner had shown a complete lack of entitlement to proceed under the old or new law. The Eleventh Circuit ruled as follows:

> [W]e choose to analyze this claim not in the abstract, but instead in terms of whether the Act makes any difference insofar as a second or successive petition raising the claims Felker wants to litigate is concerned. (Citations omitted). If Felker is barred from litigating the claims he presents under pre-existing law, then the Act's restrictions can have no unconstitutional effect on him. (Citations omitted). Stated somewhat differently, if under pre-existing law Felker's claims do not present substantial grounds upon which relief might be granted, then his claim that the Act unconstitutionally restricts his presentation of such claims does not present substantial grounds for relief, either.

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[4] As is obvious to this Court, the provisions of the new Act dealing with first time federal habeas corpus petitions are inapplicable to Petitioner, as the Act became law only shortly before Petitioner filed his application for authorization to file his second petition.

* * *

III. CONCLUSION

> Felker has failed to show substantial grounds upon which relief might be granted under the new Act. Likewise, he has failed to show substantial grounds upon which relief might be granted insofar as any constitutional issues involving the Act are concerned, because he would not be entitled to any relief even under pre-Act law.

Felker v. Turpin, slip op. at 7-8; 23-24.

The Eleventh Circuit appropriately found no set of facts to exist which would require consideration of Petitioner's second application for federal habeas corpus relief under the old or new law and found no "restriction" had been erected by the new Act to the presentation of his claims. Therefore, the writ has not been suspended in Petitioner's case.

Further, as noted by the procedural history, Petitioner had availed himself of his full panoply of direct and collateral appeals prior to attempting to file his second application for federal habeas corpus relief, with the exception of filing a petition for certiorari from his second state habeas corpus petition. Petitioner had pursued his direct appeal rights through the denial of certiorari by this Court. Petitioner had pursued his state habeas corpus rights through the denial of certiorari by this Court. Petitioner had pursued his avenues of relief under the federal habeas corpus statute then in effect by filing an initial federal habeas corpus petition; by appealing the

denial of relief to the Eleventh Circuit; by filing a petition for rehearing and rehearing en banc with the Eleventh Circuit; and by filing a petition for a writ of certiorari and a petition for rehearing in this Court from the denial of habeas corpus relief. Thus, not only has Petitioner had ample opportunity to seek, but he has in fact utilized every opportunity, and sought review of direct and collateral state court judgments and the federal habeas corpus courts' judgments prior to the Act becoming effective.

Even under the prior system of federal habeas corpus review, applicants possessed no "entitlement" to a second federal habeas corpus petition. Whether Petitioner was permitted to litigate new issues in a second or subsequent application rested within the discretion of the federal district court under 28 U.S.C. § 2244(b) and Rule 9(b). Under both the old and the new federal habeas corpus provisions, Petitioner must prove why he should be allowed to litigate a second or subsequent petition. The difference between the old and new provisions is that the showing under the new provisions is made to a three judge panel instead of to a single district court judge.

That first writ which Petitioner had cannot be suspended. That subsequent writ to which Petitioner was not entitled cannot be suspended.

The scope of the writ and applicability of the Suspension Clause at the time of the framing of the Constitution and at the present time is subject to continuing and wide-ranging debate by noted jurists and distinguished scholars alike. *See, e.g., Withrow v. Williams*, ___ U.S. ___, 113 S.Ct. 1745 (1993); *Wright v. West*, ___ U.S. ___, 112 S.Ct. 2482 (1992); *McCleskey v. Zant*, 499 U.S. 467 (1991);

Kuhlmann v. Wilson, 477 U.S. 436 (1986); *Swain v. Pressley*, 430 U.S. 372 (1976); *Fay v. Noia*, 372 U.S. 391 (1963); *Sanders v. United States*, 373 U.S. 1 (1962) (Harlan, J., dissenting); *Brown v. Allen*, 344 U.S. 443 (1953); Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 Notre Dame L. Rev. 1079 (1995); *Federal Habeas Corpus Review of State Judgments*, 22 U. Mich. J.L. Ref. 915, 918-20 (1989); Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 Harv. C.R.-C.L. L. Rev. 579 (1982); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970); Paul Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963).

While Respondent does not assert that the debate must be resolved in this case to answer this Court's third question, the concurring opinion of Chief Justice Burger in *Swain v. Pressley*, 430 U.S. 372 (1976), persuasively expresses Respondent's view. Chief Justice Burger explained:

> The sweep of the Suspension Clause must be measured by reference to the intention of the Framers and their understanding of what the writ of habeas corpus meant at the time the Constitution was drafted. The scope of the writ during the 17th and 18th centuries has been described as follows: "[O]nce a person had been convicted by a superior court of general jurisdiction, a court disposing of a habeas corpus petition could not go behind the conviction for any purpose other than to verify the formal jurisdiction of the committing court." Oaks, *Legal History in the High Court – Habeas Corpus*, 64 Mich. L. Rev. 451, 468 (1966).

> Thus, at common law, the writ was available (1) to compel adherence to prescribed procedures in advance of trial; (2) to inquire into the cause of commitment not pursuant to judicial process; and (3) to inquire whether a committing court had proper jurisdiction. The writ in 1789 was not considered "a means by which one court of general jurisdiction exercises post-conviction review over the judgment of another court of like authority." *Id.*, at 451.

Id. at 384-5. *See also* Ad Hoc Comm. on Fed. Habeas Corpus in Cap. Cases, Jud. Conf. of the U.S., Committee Report and Proposal, p. 4 n.2 (1989) ("Contrary to what may be assumed, the Constitution does not provide for federal habeas corpus review of state court decisions. The writ of habeas corpus available to state prisoners is not that mentioned in the Constitution. It has evolved from a statute enacted by Congress in 1867, now codified at 28 U.S.C. § 2254."). Therefore, applying this view, the successive habeas corpus provision of the Act would not violate the Suspension Clause.

The problematic question of what the Framers intended by the inclusion of the Suspension Clause in the Constitution and the corresponding significance of the Judiciary Act of 1789 need not be resolved in the instant case. The reason the Court does not need to grapple with the broader question is because the law is well-settled that restrictions on successive petitions are clearly not only permissible but imminently necessary. As this Court expressed 34 years ago, "Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral

proceedings whose only purpose is to vex, harass, or delay." *Sanders*, 373 U.S. at 18. Inherent in this oft-quoted observation[5] is the Court's recognition that restrictions in the area of successive petitions are not the legal equivalent of a suspension of the writ. If the "traditions" of habeas corpus do not require that "piecemeal litigation" be tolerated, then restrictions on such litigation are authorized and indeed necessary to preserve the writ's integrity. Further, this Court's tolerance of and adherence to statutory restrictions on successive habeas corpus petitions as contained in 28 U.S.C. § 2244(b) and Rule 9(b) demonstrates that this Court has not viewed these congressional restrictions as a suspension of the writ. *See Schlup v. Delo; Sawyer v. Whitley; McCleskey v. Zant*. The 1996 Act merely refines the restrictions placed on successive petitions. To find at this juncture that such restrictions violate the Suspension Clause would require this Court to disregard completely its own considerable precedent.

Nothing in the traditions of habeas corpus justifies the conclusion that Petitioner has suffered from a violation of the Suspension Clause since he has already been provided extensive collateral review in the federal courts and because he has no constitutional entitlement to a second federal habeas corpus review. No provision of the Constitution compels perpetual review to avoid a suspension of the writ.

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[5] *See, e.g., McCleskey v. Zant*, 499 U.S. at 485; *Kuhlmann v. Wilson*, 477 U.S. at 470.

CONCLUSION

This Court should dismiss this petition for a writ of certiorari as having been improvidently granted, because this Court lacks jurisdiction under Section 106 of the Act of 1996 to enertain a petition for a writ of certiorari seeking review of the decision of the Eleventh Circuit Court of Appeals. Alternatively, Respondent prays that this Court deny the petition for a writ of certiorari and vacate the stay of execution.

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No. 95-8836

In The

Supreme Court of the United States

October Term, 1995

ELLIS WAYNE FELKER,

Petitioner,

v.

TONY TURPIN, Warden, Georgia Diagnostic and Classification Center,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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ARGUMENT

I. AS PETITIONER CONCEDES, THERE IS NO VIOLATION OF THE SUSPENSION CLAUSE IN HIS CASE.

Respondent acknowledges and welcomes Petitioner's concession under Question 3 as posed by this Court that the application of the new Act to Petitioner's case does not violate the Suspension Clause of the United States Constitution and cannot serve as the basis for granting any relief to Petitioner. Petitioner draws this conclusion "in view of the disposition by the court below." (Petitioner's brief at 7; 27-29). Respondent readily agrees with the statement made by Petitioner that the decision of the Circuit Court denying Petitioner leave to file his second habeas corpus petition is the "key to this conclusion." (Petitioner's brief at 28). Unlike Petitioner, however, Respondent asserts, as he did initially, that the Circuit Court correctly decided the "merits" of Petitioner's claims and correctly found the new Act's restrictions had no unconstitutional effect on Petitioner. *Felker v. Turpin*, No. 96-1077 (11th Cir. May 2, 1996). *Compare* Petitioner's brief at 29.

Petitioner acknowledges that the resolution made of Petitioner's case by the Circuit Court justifies no granting of relief to Petitioner on the Suspension Clause issue, and this conclusion stands independently of whether this Court determines that this case is an appropriate vehicle in which to discuss broader issues relating to the present scope of federal habeas corpus.

II. TITLE I OF THE ACT DOES NOT UNCONSTITUTIONALLY RESTRICT THIS COURT'S JURISDICTION, NOR DOES THE CONSTITUTIONALITY OF THE ACT DEPEND UPON THIS COURT'S EXPANSION OF DIRECT WRITS UNDER 28 U.S.C. § 2241.

In return for recognizing that Title I of the new Act does not impermissibly restrict this Court's jurisdiction, (Question 1), Petitioner seeks to exact a quid pro quo from this Court that this Court simultaneously agree to dramatically expand the scope of direct writs under 28 U.S.C. § 2241 (Question 2). Absent compliance with Petitioner's demand that this Court allow 28 U.S.C. § 2241 to be used to avoid following new congressionally mandated statutory procedures governing successive petitions, Petitioner explicitly states in his Summary of the Argument that he will assert the Act is unconstitutional. (Petitioner's brief at 7). Petitioner seeks to force upon this Court his view that the Constitution requires that petitioners be allowed to use 28 U.S.C. § 2241 to abuse the system by creating perpetual habeas corpus review. Such a convoluted reading of the Constitution, this statute, and this Court's precedent cannot be sustained.

Petitioner attempts to lend legitimacy to his strained constitutional interpretation by invoking the talismanic phrase, " 'there is no higher duty than to maintain [the writ of habeas corpus] unimpaired.' " *Johnson v. Avery*, 393 U.S. 483, 485 (1969) (quoting *Bowen v. Johnston*, 306 U.S. 19, 26 (1939)). (Petitioner's brief at 12). The invocation by Petitioner of the traditions of habeas corpus does not cloak his "interpretation" with legitimacy. While Respondent agrees with the necessity of maintaining the

writ unimpaired, the views of Respondent and Petitioner diverge significantly on the meaning of "unimpaired."

As urged initially by Respondent, to maintain the writ of habeas corpus unimpaired is to maintain the integrity of the writ of habeas corpus, meaning the writ must be protected from abuse. Even Petitioner acknowledges that abuses of the writ of habeas corpus can be permissibly regulated by Congress. (Petitioner's brief at 22 n.20). Therefore, since the new Act is such a permissible regulation, its constitutionality on this basis is not in question.

Another faulty premise for Petitioner's argument is his invocation of the phrase "preexisting practice" to require not only that 28 U.S.C. § 2241 be unaffected by the new Act, but at the same time that 28 U.S.C. § 2241 be expanded. Petitioner attempts to use the "preexisting practice" of the Court as a basis for the expansion of direct writs. This ignores Petitioner's own admission that "[t]he Court's preexisting practice, described in Supreme Court Rule 20.4(a), has treated the entire subject of original habeas as exceptional and discretionary." (Petitioner's brief at 15). Petitioner conveniently omitted recognition of the portion of Rule 20.4(a) which states, "This writ is rarely granted." Petitioner also fails to note the requirement of the Rule that a petitioner show "that exceptional circumstances warrant the exercise of the Court's discretionary powers" in terming the writ as an "exceptional" one. Thus, the Rule, read as a whole, renders unconscionable Petitioner's attempt to expand direct writs and is in direct contravention of the "preexisting practice" of this Court.

This expansion of the availability of direct writs as urged by Petitioner is without historical or legal precedent. Nothing in the "preexisting practice" of this Court with respect to direct writs authorizes a conversion of this writ from "rare" to commonplace usage or allows all habeas corpus petitioners to seek direct review from this Court despite their failure to comply with other applicable statutory requirements. Such a conversion would authorize perpetual, rather than exceptional, review.

In addition, Petitioner illogically relies on the "plain meaning" rule of statutory construction to justify the expansion of 28 U.S.C. § 2241. Petitioner argues that because "plain meaning controls statutory construction," (Petitioner's brief at 10 n.7), the new Act does not, by its terms, affect the jurisdiction of this Court as contained in 28 U.S.C. § 2241. Petitioner ignores the logical conclusion which must be drawn from this assertion. If a "plain meaning" reading of the new Act is that 28 U.S.C. § 2241 direct writs are not affected, Petitioner cannot use "plain meaning" to expand the scope of direct writs beyond their traditionally limited and extraordinary scope.

While seeking to apply the plain meaning rule to the new Act, Petitioner contradictorily ignores this rule in connection with Supreme Court Rule 20.4(a) by seeking to redefine "exceptional circumstances" as contained in that rule. Under Petitioner's proposed definition, "exceptional circumstances" would include all unsuccessful ATF applicants and all capital habeas corpus petitioners. Nothing in this Court's jurisprudence compels such a reading of 28 U.S.C. § 2241.

While stressing one rule of statutory construction, i.e., the plain meaning rule, Petitioner neglects to cite another rule of statutory construction which is even more significant in the context of this case. As noted in the brief filed on behalf of the Solicitor General, this Court in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) stressed that "where two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." (Solicitor General's brief at 30-31). *See also Vimar Seguro Y Reaseguros, S.A. v. M/V Sky Reefer*, ___ U.S. ___, 115 S.Ct. 2322, 2326 (1995) (citing *Morton v. Mancari*, 417 U.S. 535, 551 (1974) and *Pittsburgh & Lake Erie R. Co. v. Railway Labor Executives' Assn.*, 491 U.S. 490, 510 (1989)). Thus, as Respondent argued in his opening brief, plain meaning in this context may be read to allow peaceful coexistence between the new Act and the traditional scope of 28 U.S.C. § 2241.

Even though the gravamen of Petitioner's argument is to urge a more expansive interpretation of 28 U.S.C. § 2241, Petitioner alternatively relies on what he terms as this Court's "immemorial power to review plainly wrong refusals of habeas corpus relief on the basis of improper legal standards applied by lower federal courts." (Petitioner's brief at 10-11). The new Act does not interfere with any "immemorial power."

Petitioner's denomination of the ATF procedure set forth in § 106(b)(3)(A) of the Act as a "strict screening mechanism" (Petitioner's brief at 10) for successive petitions in the circuit courts is an implied concession that removal of the review of that decision does not derogate any "immemorial power." Respondent pointed out in his

initial brief that there historically did not exist any "immemorial power" concerning state prisoners, *see* Habeas Corpus Act of 1867; nor has this Court chosen to exercise any "immemorial power" regarding successive petitions; nor has this Court shown any tolerance for repeated abuses of the writ of habeas corpus. Thus, Respondent disputes Petitioner's assertion that the "immemorial power" of this Court is somehow abridged by the provisions of the new Act simply creating a "strict screening mechanism" for successive petitions.

Petitioner argues that there is a need for this Court to review the circuits courts' judgments on ATF applications in order to prevent the creation of "circuit supreme courts" and to prevent conflicts in the circuits. As asserted in the brief amici curiae of the Criminal Justice Legal Foundation and Citizens for Law and Order in support of Respondent, such an asserted "constitutional imperative for appellate jurisdiction" is without support in caselaw or history and is a matter for congressional consideration and resolution. (Brief of Amici Curiae for Respondent at 10). This Court can in future decisions interpret the standards set forth in the new statute and the manner in which an applicant can satisfy these standards (an analysis and interpretation unnecessary in this case under the circuit court's ruling) in cases in which an authorization to file has been granted and thereby, in reviewing those decisions, insure uniformity in the application of the successive petition requirements.

In the amici curiae brief of the American Civil Liberties Union and the ACLU of Georgia in support of Petitioner, amici make reference to what they call the "small core of successive petitions still permitted under the Act"

as needing review by this Court to assure "the supremacy of federal law and a uniform interpretation of the federal Constitution." (Amici Curiae Brief on behalf of the American Civil Liberties Union and the ACLU of Georgia at 7). It is the intention of Congress under the new Act, as it was the intention of this Court under such cases as *McCleskey v. Zant*, 499 U.S. 467 (1991), to severely limit the number of successive petitions to this "small core." However, Respondent takes issue with the assertion of those amici for Petitioner which alleges that the Court will effectively be denied jurisdiction to review these cases. This "small core" of successive petitions permitted under the Act will of course be reviewable by this Court because if such petitions are permitted to be filed under the Act, they will be filed in the district court and proceed to be reviewed on the appellate level in the same manner as under the old law. If review of the denial of ATF were available under the new Act, the only review would be whether there had been an abuse of discretion in not allowing the successive petition to be filed. The Court would not be reviewing to insure a "uniform interpretation of the federal Constitution." This argument therefore provides no support for the assertion that removal of the abuse of discretion review amounts to an improper restriction of the Court's jurisdiction.

In cases under the old law where this Court reviewed a lower court's decision to dismiss a petition as an abuse of the writ, the Court generally engaged in no sweeping constitutional pronouncements but rather determined whether, as a factual matter, a petitioner had met the new requirements to proceed as to the "merits" of the petition. In the past, the decisions of this Court in such instances

have been of little precedential value but, rather, have been brief statements as to whether the lower court abused its discretion in applying the appropriate standard at that time. A similar and limited review is all that this Court would be engaged in if it reviewed the denial of ATF applications. Respondent questions whether this Court should exercise its extraordinary jurisdiction under 28 U.S.C. § 2241 to review ATF applications for abuses of discretion in order to assure uniformity.

Petitioner argues that without review of decisions denying ATF, habeas corpus applicants such as those in *Schlup v. Delo*, ___ U.S. ___, 115 S.Ct. 851 (1995), and *Sawyer v. Whitley*, 505 U.S. ___, 112 S.Ct. 2514 (1992), would not have obtained relief under the new habeas corpus provisions. (Petitioner's brief at 22-27). This argument is unavailing as it is sheer speculation to assume that those petitioners would not have met the ATF criteria and thus been allowed to have their successive petitions reviewed in due course under the statute, including seeking review on a petition for certiorari in this Court.

In removing this Court's obligation to review this "strict screening" decision, this Court is not being removed, as Petitioner asserts, from reviewing important federal constitutional principles and insuring their uniformity in interpretation and application. As this Court has observed, very few new "bedrock" principles of constitutional law are now being propounded by this Court, and those which are can still be litigated under the present system. Moreover, as this Court specifically recognized in *Sawyer v. Smith*, 497 U.S. 227, 243 (1990) (quoting *Teague v. Lane*, 489 U.S. 288 (1989)), "it is 'unlikely that many such components of basic due process have yet to

emerge.' " The likelihood of such "bedrock" principles emerging in the course of reviewing denials of ATF is negligible.

As Petitioner acknowledges at page ten of his brief, under the ATF provisions of the new act, a respondent (in this case, the state warden where Petitioner is incarcerated) is not authorized to appeal a decision to allow a successive application to proceed. Despite the state's recognized interest in the finality of its judgments and in eliminating delay caused by collateral review, a respondent will be unable to evade the provisions of the act if there is disagreement with the circuit court's judgment. If a petitioner could circumvent the inability to appeal by filing a direct writ, a petitioner would be allowed a benefit not flowing to the respondent. Would Petitioner agree that an unsuccessful respondent would thereby also be able to utilize direct writs to seek review of a statutorily unreviewable decision of the circuit court?

There are numerous indications in both statutory provisions and this Court's rules that 28 U.S.C. § 2241 should not be utilized in lieu of filing an application for federal habeas corpus relief in the lower courts. For example, 28 U.S.C. § 2242 states that if an application for writ of habeas corpus is addressed to the Supreme Court or justice thereof, "it shall state the reasons for not making application to the district court of the district in which the applicant is held." This provision appears to serve as a warning that 28 U.S.C. § 2241 is not to be utilized to forum shop. This premise is supported by the provisions of Rule 20.4(a) of this Court which also requires that a petitioner filing under 28 U.S.C. § 2241 be required to show "that adequate relief cannot be obtained

in any other form or from any other court." This is also supported by Petitioner's recognition of the transfer authority incorporated within 28 U.S.C. § 2241 authorizing this Court to transfer direct writs to the appropriate lower federal court. (Petitioner's brief at 16 n.11). Such acknowledgement by Petitioner is at odds with Petitioner's assertion that the direct writ should be expanded, as the statutory provision already recognizes and generally applies the transfer authority so as not to function as an additional federal court and thus expand the forums in which successive petitions can be filed.

Respondent submits that, contrary to Petitioner's assertions, in order to make the requisite showing under 28 U.S.C. § 2241, it is not sufficient to show that resort to another court is futile, but a petitioner must in fact show that resort to another court is unavailable. The required showing is more than futility; it is unavailability.

In light of these current statutes and rules, the promotion by Petitioner of a system which permits the lower courts to be bypassed or ignored if they do not offer a "friendly forum," amounts to forum shopping and is reminiscent of the writ as it existed at common law allowing a petitioner to continually seek new forums until he was able to obtain release. *See, e.g., McCleskey v. Zant*, 499 U.S. 467, 479-481 (1991) (quoting W. Church, *Writ of Habeas Corpus* § 386, p. 570 (2d ed. 1893) and *Salinger v. Loisel*, 265 U.S. 224, 230-231 (1923) (recognizing that the common law rule allowed endless renewed applications for the same relief to be made to "every other judge or court in the realm," but that this Court had since held that the availability of appellate review in the

criminal case required a material modification of this practice to permit disposal of successive petitions).

The extraordinary discretion of this Court should not be allowed to be used to denigrate this Court's paramount task of reviewing significant cases of far-reaching application. A writ which has been rarely used and even more rarely granted should not be allowed to be utilized to broaden the opportunity for successive petitioners to seek review of frivolous claims. The direct writ should not be interpreted to give a petitioner a greater opportunity to obtain collateral review, rather than narrowing the opportunity for obtaining successive collateral review as contemplated by the Act.

In summary, to allow the use of 28 U.S.C. § 2241 direct writs to review ATF denials would circumvent the statutory provisions set forth in the new Act as to successive petitions; unduly burden this Court by increasing this Court's duty over nonfundamental functions; add another commonly available layer of review to a system already providing multiple reviews; and expand beyond all present comprehension the scope and availability of 28 U.S.C. § 2241.

Petitioner's arguments fly in the face of the clear congressional intent underlying the new Act and threaten to undermine any statutory scheme for successive petitions adopted by Congress. If such a proposed expansion of 28 U.S.C. § 2241 is adopted by this Court, this will effectively absolve successive habeas corpus petitioners from the necessity of meeting the requirements of the new Act and allow the use of 28 U.S.C. § 2241 to review

unsuccessful attempts to meet the ATF provisions of the Act.

As to the remaining broader constitutional issues included in the Court's questions, Respondent has already stated his position that these questions present no case or controversy in the context of Petitioner's case and thus, recalendaring of these issues in this case is unwarranted. Any resolution which this Court wishes to make of these broader issues can more appropriately be resolved in future cases where the application of these constitutional principles presents a case or controversy.

CONCLUSION

By virtue of the Eleventh Circuit's disposition of Petitioner's ATF application below, and in light of Petitioner's failure to establish that the specific successive petition provisions of the new Act are unconstitutional on their face or as applied to Petitioner, Respondent submits that this petition for writ of certiorari should be dismissed as improvidently granted. Respondent opposes Petitioner's request that the stay of execution remain in effect until this Court is able to address Petitioner's questions, i.e., the standards which should govern original petitions and that the circuit court violated rather than applied the Act. Petitioner has established no basis upon which his questions are entitled to resolution and has demonstrated no basis for being granted an additional

stay of execution for the purpose of answering questions the resolution of which will not afford him relief.

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No. 95-8836

In the Supreme Court of the United States

OCTOBER TERM, 1995

ELLIS WAYNE FELKER, PETITIONER

v.

TONY TURPIN, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996 (the Act), and in particular Section 106(b)(3)(E) of the Act, 28 U.S.C. 2244(b)(3)(E), is an unconstitutional restriction of the jurisdiction of this Court.

2. Whether and to what extent the provisions of Title I of the Act apply to petitions for habeas corpus filed as original matters in this Court pursuant to 28 U.S.C. 2241.

3. Whether application of the Act in this case is a suspension of the writ of habeas corpus in violation of Article I, Section 9, Clause 2, of the Constitution.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

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v.

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case presents three questions regarding the scope and constitutionality of the habeas corpus provisions contained in Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996. The United States has an important interest in the resolution of those issues. In the Court's order granting certiorari and specifying the questions to be briefed, the Court invited the Solicitor General to file a brief expressing the views of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 9, Clause 2, of the U.S. Constitution (the Suspension Clause), and Article III of the

Constitution, in relevant part, are set forth in an appendix to this brief, App., *infra*, 1a-2a, as are Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996, App., *infra*, 2a-23a, and Chapters 153 and 154 of Title 28 of the United States Code, as amended (showing new material italicized and deleted material bracketed), App., *infra*, 24a-53a.

STATEMENT

In 1983, after a jury trial in the Superior Court of Houston County, Georgia, petitioner was convicted of first-degree murder, rape, aggravated sodomy, and false imprisonment; he was sentenced to death on the murder count. The conviction was upheld on direct appeal to the Georgia Supreme Court, and this Court denied certiorari. Petitioner then unsuccessfully sought postconviction relief in state habeas corpus; this Court again denied certiorari. In 1993, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Georgia. The district court denied relief, the court of appeals affirmed, and this Court denied certiorari. The State set May 2-9, 1996, as the execution period. On April 29, 1996, petitioner filed a second state habeas corpus petition, which was denied; the Georgia Supreme Court denied certiorari. Petitioner then sought a stay of execution and applied for leave to file a second federal habeas corpus petition in federal district court, pursuant to Title I, § 106, of the Anti-Terrorism and Effective Death Penalty Act of 1996. On May 2, 1996, the court of appeals denied both the stay of execution and petitioner's application for leave to file a second or successive habeas petition. Petitioner then filed a petition for a writ of

habeas corpus and a petition for a writ of certiorari in this Court. The Court stayed the execution, granted the petition for certiorari, and directed briefing limited to three questions framed by the Court.

1. On the evening of November 24, 1981, 19-year-old Evelyn Joy Ludlam disappeared. Ludlam had arranged to meet petitioner on the day of her disappearance to discuss employment at a leather shop that petitioner owned, and a note found in Ludlam's abandoned car indicated that she had planned to join petitioner and some of his friends for dinner that night. When questioned by police on the evening of November 25, 1981, petitioner admitted that Ludlam had visited his shop the previous day, but stated that Ludlam had left the shop at about 6:00 p.m. when it closed and had driven off alone in her own car. Petitioner further stated that Ludlam was wearing a red dress and a plaid coat when he had last seen her. As the person last known to have seen Ludlam, petitioner, who had been paroled several months earlier on a 1976 aggravated sodomy conviction, became the prime suspect in Ludlam's disappearance and was placed under constant police surveillance.

On December 8, 1981, Ludlam's body was found floating in a creek in rural Georgia, clothed in the same red dress and plaid coat that she was wearing when last seen before her disappearance two weeks earlier. Her body and clothing contained evidence of sexual assault. An autopsy performed by a medical examiner with the state crime laboratory revealed that Ludlam had died of asphyxiation caused by strangling before her body was deposited in the creek. The medical examiner initially placed the time of death at 3 to 5 days before the discovery of Ludlam's

body (at a time when petitioner was under police surveillance); after reviewing air and water temperature data, however, and consulting case studies involving immersion deaths, the medical examiner revised his opinion. He concluded that Ludlam's death may have occurred as early as two weeks before her body was discovered and at a time when petitioner could not account for his presence. On February 4, 1982, Ludlam's body was exhumed for examination by a pathologist. In addition to confirming evidence of sexual assault, the pathologist agreed with the medical examiner's opinion that Ludlam had likely died two weeks before her body was discovered.

The circumstances surrounding Ludlam's disappearance and ensuing sexual abuse were virtually identical to those underlying petitioner's 1976 conviction for aggravated sodomy. In addition, in the months following the discovery of Ludlam's body, police officers conducted multiple warranted searches of petitioner's residence, automobile, and shop. Hair and fiber evidence collected in those searches directly tied petitioner to the crime.

2. In 1983, petitioner was convicted of first-degree murder, rape, aggravated sodomy, and false imprisonment; after sentencing proceedings before a jury, he was sentenced to death on the murder count. On appeal, the Georgia Supreme Court affirmed petitioner's convictions and death sentence. *Felker* v. *State*, 314 S.E.2d 621 (1984). Although recognizing that the evidence was circumstantial and that there was conflicting expert testimony concerning the time of Ludlam's death, the Georgia Supreme Court held that the evidence "compellingly demonstrate[d]" that petitioner had murdered Ludlam and that the evidence also showed that petitioner had

raped and sodomized her. *Id.* at 628, 630-631, 637-638. This Court denied certiorari. *Felker* v. *Georgia*, 469 U.S. 873 (1984).

3. On December 17, 1984, petitioner filed a state habeas corpus petition collaterally challenging his convictions and sentence. On August 6, 1990, the petition was denied by the state trial court, and on September 3, 1991, an application for a certificate of probable cause to appeal that order was denied by the Georgia Supreme Court. This Court denied certiorari. *Felker* v. *Zant*, 502 U.S. 1064 (1992).

4. On April 27, 1993, petitioner submitted for filing his first federal habeas corpus petition under 28 U.S.C. 2254; it was formally filed in the district court on June 2, 1993. In it, petitioner challenged his state convictions and sentence on five grounds: (1) that the evidence was insufficient to support his convictions; (2) that the prosecutors violated the rule in *Brady* v. *Maryland*, 373 U.S. 83 (1963), in failing to disclose exculpatory evidence; (3) that his retained trial counsel was constitutionally ineffective during the capital sentencing stage of his trial; (4) that hypnosis was improperly used to refresh the memory of a prosecution witness; and (5) that double jeopardy and collateral estoppel principles barred the admission of evidence concerning his prior conviction for aggravated sodomy. On June 9, 1993, the district court entered an order directing petitioner to amend his habeas petition to include any other alleged constitutional errors or deprivations that he wished to assert. Petitioner did not amend his initial filing.

On January 26, 1994, the district court denied petitioner federal habeas corpus relief. The court of appeals affirmed the denial of federal habeas corpus

relief on May 8, 1995. *Felker* v. *Thomas*, 52 F.3d 907, opinion extended on denial of rehearing, 62 F.3d 342 (11th Cir. 1995). On February 20, 1996, this Court denied certiorari, *Felker* v. *Thomas*, 116 S. Ct. 956, and denied rehearing on April 20, 1996.

5. A state judge then issued an order scheduling petitioner's execution for the period May 2-9, 1996. On April 29, 1996, petitioner filed a second petition for state habeas corpus relief. On May 1, 1996, the state trial court denied the second state habeas petition, and on May 2, 1996, the Georgia Supreme Court denied a petition for a writ of certiorari.

6. On April 24, 1996, the President signed into law the Anti-Terrorism and Effective Death Penalty Act of 1996. Section 106(b)(2) of the Act provides that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. 2244(b)(2).

Section 106(b)(3)(A) of the Act provides that, "[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. 2244(b)(3)(A). The motion for leave to file a second or successive application in the district court for relief under Section 2254 "shall be determined by a three-judge panel of the court of appeals," 28 U.S.C. 2244(b)(3)(B), which "may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection," 28 U.S.C. 2244(b)(3)(C). The decision of the three-judge panel to grant or deny authorization to file a second or successive application for federal collateral relief "shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. 2244(b)(3)(E).

7. Following denial of his successive petition for state habeas relief, petitioner filed in the United States Court of Appeals for the Eleventh Circuit a motion for a stay of execution and an application for leave to file a second or successive federal habeas corpus petition under Section 2254 in the district court. In his filing in the court of appeals, petitioner asserted (1) that the jury instruction defining "reasonable doubt" at the guilt phase of his trial was constitutionally defective under this Court's holding in *Cage* v. *Louisiana*, 498 U.S. 39 (1990) (per curiam), the retroactivity of which, petitioner asserted, became apparent only after this Court's deci-

sion in *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993);[1] and (2) that his rights under the Eighth and Fourteenth Amendments were violated when a non-physician medical examiner employed by the State "provide[d] [the] sole evidence upon which [the] jury relied to determine the critical issue of time of death" at trial. Pet. App. 25-26. As new evidence supporting the latter claim, petitioner submitted affidavits by two pathologists challenging the qualifications of the state medical examiner who performed the autopsy and the validity of the medical examiner's conclusions regarding the time of the victim's death. See Pet. 22-30. In addition, petitioner argued that the habeas corpus reform provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996 violated the Constitution in multiple respects.

a. The court of appeals concluded that petitioner "failed to show substantial grounds upon which relief might be granted under the new Act." Pet. App. 34. The court of appeals explained that petitioner's *Cage* claim could not be regarded as " 'previously unavailable' to him when he filed his first [federal] habeas petition in 1993," because *Cage* had been decided nearly three years earlier. Pet. App. 25. And, "[e]ven assuming * * * the dubious legal argument

[1] In *Cage*, the jury instruction defined "reasonable doubt" as "such doubt as would give rise to a grave uncertainty" and "an actual substantial doubt," and it stated that "[w]hat is required is not an absolute or mathematical certainty, but a moral certainty." 498 U.S. at 40 (emphasis omitted). This Court held that the instruction was unconstitutional, because it could be interpreted by a juror as allowing a finding of guilt based on a degree of proof that was less than required by due process principles. In *Sullivan*, this Court held that a constitutionally deficient reasonable doubt instruction of the kind at issue in *Cage* could never be harmless error.

that *Cage* was not available to [petitioner] until the *Sullivan* decision was announced," the court of appeals noted that petitioner's initial federal habeas petition was formally docketed on the day after *Sullivan* was decided and that petitioner could have amended his initial petition to include a claim under *Cage*. *Ibid.*

Similarly, the court of appeals held that petitioner's claim, made without support in "any decisional law" (Pet. App. 25), that the Constitution barred sole reliance on the testimony of a non-physician medical examiner to establish critical factual issues in a capital murder trial failed to satisfy the requirements of the Act. The court observed that petitioner was not "rel[ying] on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court," as required by Section 2244 (b)(2)(A). *Ibid.* Nor did petitioner's claim rest on a newly discovered factual predicate that, in the context of all of the evidence, would show that, but for constitutional error, no reasonable factfinder would have found petitioner guilty on the underlying offense, as required by Section 2244(b)(2)(B). First, the court noted that, because the factual predicate for the claim was "apparent on the face of the trial record," it was not newly "discovered * * * through the exercise of due diligence." Pet. App. 25-26. Moreover, even "if proven and viewed in light of the evidence as a whole," the court of appeals found that the facts underlying petitioner's attack on the medical examiner's testimony "would not be sufficient to establish by a preponderance of the evidence, much less by clear and convincing evidence, that but for the alleged constitutional error, no reasonable factfinder

would have found [petitioner] guilty of the underlying offense." Pet. App. 26.

b. Turning next to petitioner's constitutional challenge to the habeas reform provisions of the Act, the court of appeals "ch[ose] to analyze this claim not in the abstract, but instead in terms of whether the Act makes any difference insofar as a second or successive petition raising the claims [petitioner] wants to litigate is concerned." Pet. App. 26.[2] Concluding that petitioner "would not be entitled to any relief even under pre-Act law," the court of appeals held that petitioner "ha[d] failed to show substantial grounds upon which relief might be granted insofar as any constitutional issues involving the Act are concerned." Pet. App. 34.

c. Finally, without deciding whether the Act precludes claims based on innocence as an independent constitutional claim, the court of appeals held that, even if it did, petitioner had failed to establish the existence of a valid claim of actual innocence. Pet. App. 33.

d. Because petitioner had not made a prima facie showing of entitlement to collateral relief either under

[2] The court of appeals noted that Section 107 of the Act, which creates special procedures that apply on federal habeas corpus to capital cases arising in States that have adopted an approved mechanism for the appointment and compensation of counsel for condemned prisoners in state collateral proceedings, see 28 U.S.C. 2261-2266, was inapplicable to this case, as "[t]here is no contention * * * that the State of Georgia has shown—or even had an opportunity to show—that it qualifies to benefit" from the special procedures. Pet. App. 24 n.1. Accordingly, the court of appeals expressly declined to address the validity of the special capital procedures contained in Section 107. *Ibid.*

the Act or under preexisting law, the court of appeals denied both his motion for an order authorizing the filing of a second or successive federal habeas petition in the district court and his request for a stay of execution. Pet. App. 34.

8. On May 2, 1996, petitioner filed in this Court an application for a stay of execution, a petition for a writ of habeas corpus, and a petition for a writ of certiorari. On May 3, 1996, this Court granted petitioner's application for stay of execution of sentence of death, granted certiorari, and requested expedited briefing limited to three questions.[3]

SUMMARY OF ARGUMENT

I. Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996 does not unconstitutionally restrict the jurisdiction of this Court. Under the Act, an applicant for habeas corpus, before filing a second or successive habeas petition in federal district court, must seek leave from a court of appeals and establish a prima facie case of eligibility for habeas relief under the standards of the Act. § 106(b)(3)(A) and (C). The court of appeals' grant or denial of leave to file is neither appealable nor subject to review in

[3] "The parties shall submit briefs limited to the following questions: (1) Whether Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996 (the Act), and in particular Section 106(b)(3)(E), 28 U.S.C. § 2244(b)(3)(E), is an unconstitutional restriction of the jurisdiction of this Court. (2) Whether and to what extent the provisions of Title I of the Act apply to petitions for habeas corpus filed as original matters in this Court pursuant to 28 U.S.C. § 2241. (3) Whether application of the Act in this case is a suspension of the writ of habeas corpus in violation of Art. I, § 9, clause 2 of the Constitution." *Felker* v. *Turpin*, No. 95-8836, Order (May 3, 1996).

this Court on petition for certiorari. § 106(b)(3)(E). Title I of the Act, however, does not divest this Court of its jurisdiction to entertain original petitions for habeas corpus. Nor does it deprive the Court of the opportunity, in the exercise of that jurisdiction and on certiorari review of second or successive habeas petitions that courts of appeals authorize to be filed, to review questions that may arise regarding application of the Act. In those circumstances, Title I does not work an unconstitutional restriction of the jurisdiction of this Court.

Article III of the Constitution provides that this Court has appellate jurisdiction over enumerated categories of cases, "with such Exceptions, and under such Regulations as the Congress shall make." Art. III, § 2, Cl. 2. From the first Judiciary Act of 1789, Congress has exercised that power by selectively defining the authority of this Court to exercise appellate review. The consistent practices of past Congresses establish that Article III does not mandate that this Court have appellate jurisdiction over every case that falls within the coverage of the "judicial Power."

This Court's precedents support the view that Title I does not unconstitutionally restrict the jurisdiction of this Court. In *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), the Court upheld a law withdrawing this Court's appellate jurisdiction to review a habeas corpus determination made by a lower court. In *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869), the Court made clear that the law involved in *McCardle* did not divest the Court of its jurisdiction to hear original habeas corpus actions. In similar fashion, Title I of the Act precludes review of a court of appeals' "gatekeeping" determination on a request

to file a second or successive habeas petition in federal district court, but leaves open the avenue, available under 28 U.S.C. 2241 and 2254, for a habeas petitioner to file an original petition in this Court.

Congressional action to restrict this Court's appellate jurisdiction may raise difficult and important constitutional issues. This Court has not recently addressed those questions, nor does this case raise a difficult constitutional issue. Under any of the prevailing theories regarding those issues, Section 106(b) of Title I of the Act, and Section 106(b)(3)(E) in particular, would not be an unconstitutional restriction of the Court's jurisdiction.

II. Title I does not divest this Court of its power to entertain an application for a writ of habeas corpus filed as an original matter in this Court pursuant to 28 U.S.C. 2241. That provision vests this Court with jurisdiction to issue writs of habeas corpus on the ground that a person is in state custody in violation of the Constitution, a federal statute, or treaty. Nothing in Title I amends that provision. Nor does any other provision of Title I implicitly limit the Court's original habeas jurisdiction.

The substantive restrictions on the filing of a second or successive habeas petition in Section 106(b)(1) and (2), however, do apply to this Court's consideration of such a habeas application. The text of the Act makes clear that the substantive restrictions are applicable to any second or successive habeas corpus application filed under 28 U.S.C. 2254, and Section 2254 applies to habeas corpus petitions entertained by this Court, as well as by the lower federal courts. Accordingly, the Court's consideration of original second or successive habeas applications is governed by the substantive provisions of Section 106(b).

III. The application of the Act in this case does not unconstitutionally suspend the writ of habeas corpus, in violation of Article I, Section 9, Clause 2, of the Constitution. That Clause states that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

The Court has often remarked that, as understood at the time the Constitution was ratified, a prisoner could not invoke habeas corpus to challenge confinement pursuant to a conviction entered by a court of competent jurisdiction. And as embodied in federal statutory law, habeas corpus (with narrow exceptions) was not made available to a prisoner held in *state* custody until 1867. The implications of those circumstances in defining the privilege of the writ of habeas corpus protected by the Suspension Clause need not be explored in this case. It is not a suspension of the writ to place reasonable restrictions on the filing of a second or successive habeas corpus petition. The restrictions in Section 106(b) are generally reasonable. And, as applied to petitioner, who seeks to file a second habeas corpus petition challenging procedures at his trial, the restrictions of the Act are constitutional.

ARGUMENT

I. TITLE I OF THE ACT DOES NOT UNCONSTITUTIONALLY RESTRICT THE JURISDICTION OF THIS COURT

Under Article III of the Constitution, "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Art. III, § 1. "The judicial Power shall extend

to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." Art. III, § 2, Cl. 1. The jurisdiction of this Court is described by Article III, Section 2, Clause 2, which states:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Section 106(b)(3)(A) of the Anti-Terrorism and Effective Death Penalty Act of 1996 provides that, "[b]efore a second or successive application [for habeas corpus] permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." Section 106(b)(3)(E) provides that "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." Those provisions thus limit the availability of appeal or certiorari from the court of appeals' "gatekeeping" determination. Title I of the Act, however, does not unconstitutionally restrict the jurisdiction of this Court. The Act does not deprive this Court of its jurisdiction under 28 U.S.C. 2241 to entertain original petitions for a writ of habeas corpus. Nor does the Act restrict or interfere with this Court's interpretation of Title I as applied in habeas corpus cases that a court of appeals authorizes to be filed. Whatever the constitutional limits

on Congress's power to restrict this Court's appellate jurisdiction, Title I is a permissible exercise of Congress's power under the Exceptions and Regulations Clause.

A. The Constitution Does Not Require Congress To Extend This Court's Appellate Jurisdiction To The Full Scope Authorized By Article III

1. This Court has recognized the Judiciary Act of 1789, ch. 20, 1 Stat. 73, to be "[a] contemporaneous exposition of the constitution, certainly of not less authority than [*The Federalist*]." *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 420 (1821) (Marshall, C.J., for the Court). See also *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 297 (1888) (Judiciary Act of 1789 "was passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning"); *Ames* v. *Kansas*, 111 U.S. 449, 463-464, 469 (1884). The 1789 Act did not confer upon this Court the full measure of appellate jurisdiction permitted by the Constitution, nor did it authorize the Court to review all judgments entered by lower federal courts. Notably, the Act did not provide for appellate review of federal criminal convictions.[4] In civil cases, final judgments of the circuit courts were reviewable on writ of error only where the amount in controversy exceeded $2000. § 22, 1 Stat. 84. The Court was authorized to review the decision of the highest court of a State

[4] The Act authorized this Court to issue writs of habeas corpus (see § 14, 1 Stat. 81-82), which permitted some review in federal criminal cases, but habeas review was substantially narrower than review on appeal or writ of error.

only where the state court had rejected a federal claim. See § 25, 1 Stat. 85-87. Thus, the First Congress understood Article III to permit exceptions from this Court's authorized appellate jurisdiction under the Constitution.

2. In 1802, the Court was given jurisdiction in federal criminal cases where the judges of the circuit court were divided on a question of law. Act of Apr. 29, 1802, ch. 31, § 6, 2 Stat. 159-161. An 1889 statute permitted the Court to exercise appellate review in federal capital cases. Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 656. The Court's appellate jurisdiction was further extended in 1891 to include "cases of conviction of a capital or otherwise infamous crime." Act of Mar. 3, 1891 (Evarts Act), ch. 517, § 5, 26 Stat. 827.[5] More generally, the Evarts Act also authorized this Court to review, by appeal or writ of error, the decision of a district or circuit court in "any case that involves the construction or application of the Constitution of the United States"; "any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question"; and "any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States." § 5, 26 Stat. 828. In 1914, the Court was given appellate jurisdiction over state court decisions upholding a federal claim. Act of Dec. 23, 1914, ch. 2, 38 Stat. 790.

Today, the expansion of appellate jurisdiction has conferred on the Court virtually plenary jurisdiction

[5] The term "infamous crime" was construed by this Court to include all offenses punishable by a penitentiary sentence. See *In re Claasen*, 140 U.S. 200, 204-205 (1891).

over decisions of the federal courts of appeals, as well as state courts of last resort on issues of federal law, subject to the exercise of the Court's discretion to grant review. See 28 U.S.C. 1254, 1257. The historical development of the relevant jurisdictional provisions, however, indicates that the Constitution itself has never been thought by Congress to mandate appellate jurisdiction over all lower court decisions resting on federal law.

B. This Court's Precedents Have Acknowledged Congressional Power To Regulate The Court's Appellate Jurisdiction

1. From the earliest days of the Nation, this Court has acknowledged that its appellate jurisdiction need not reach the limits of Article III. In *United States* v. *More*, 7 U.S. (3 Cranch) 159 (1805), the Court (per Chief Justice Marshall) dismissed for want of jurisdiction the government's appeal from a circuit court decision sustaining the defendant's demurrer to a criminal indictment. The Court observed that, "if the supreme court had been created by law, without describing its jurisdiction," the circuit court's decision would have been subject to appellate review, because "[t]he constitution would then have been the only standard by which [this Court's] powers could be tested." *Id.* at 173. The Court concluded, however, that, "as the jurisdiction of the court has been described, it has been regulated by congress, and an affirmative description of its powers must be understood as a regulation, under the constitution, prohibiting the exercise of other powers than those described." *Ibid.*

The Court employed similar reasoning in *Durousseau* v. *United States*, 10 U.S. (6 Cranch) 307 (1810). Section 22 of the Judiciary Act of 1789 provided that

final judgments of the circuit courts in civil cases were reviewable on writ of error "where the matter in dispute exceed[ed] the sum or value of two thousand dollars." 1 Stat. 84. The Court in *Durousseau* construed Section 22 as implicitly precluding its exercise of appellate jurisdiction in civil cases where the amount in controversy was less than $2000. And the Court recognized that Congress's power to make "Exceptions" to its appellate jurisdiction underlay the imposition of the jurisdictional amount requirement. The Court (again per Chief Justice Marshall) explained:

> When the first legislature of the Union proceeded to carry the third article of the constitution into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the supreme court. They have not, indeed, made these exceptions in express terms. They have not declared, that the appellate power of the court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it.

10 U.S. (6 Cranch) at 314.

2. In *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), the Court upheld, as against an Article III challenge, a provision that withdrew from the Supreme Court's appellate jurisdiction the authority to review habeas corpus decisions of lower federal courts. McCardle was a Mississippi resident "held in custody by military authority for trial before a military commission, upon charges founded upon the publication of articles alleged to be incendiary and

libellous, in a newspaper of which he was editor." *Id.* at 508 (statement of the case). His petition for habeas corpus was denied by the circuit court. *Id.* at 507-508. McCardle appealed to this Court, relying on an 1867 statute that authorized appeals from the circuit courts to the Supreme Court in habeas cases.[6]

While McCardle's appeal was pending, Congress passed the Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44, which repealed the 1867 statute insofar as it authorized appeals to this Court. 74 U.S. (7 Wall.) at 508 (statement of the case).[7] The sponsor of the 1868 Act explained that the Act's purpose was to prevent the Court from utilizing McCardle's appeal "to infringe upon the political power of Congress and declare the laws for the government of the rebel States in every respect unconstitutional." Cong. Globe, 40th Cong., 2d Sess. 2062 (1868) (Rep. Wilson). In the view of Representative Wilson, "it was [Congress's] duty to intervene by a repeal of the jurisdiction and prevent the threatened calamity falling upon the country." *Ibid.*

A unanimous Court dismissed McCardle's appeal for want of jurisdiction. After noting that the Court's appellate jurisdiction "is conferred 'with such exceptions and under such regulations as Congress shall make,' " 74 U.S. (7 Wall.) at 512-513, the Court stated:

[6] See Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 386.

[7] The 1868 Act provided "[t]hat so much of the [1867 Act] * * * as authorizes an appeal from the judgment of the circuit court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court on appeals which have been or may hereafter be taken, be, and the same is, hereby repealed." § 2, 15 Stat. 44 (quoted in *McCardle*, 74 U.S. (7 Wall.) at 508 (statement of the case)).

> The exception to appellate jurisdiction in the case before us * * * is made in terms. The provision of the act of 1867, affirming the appellate jurisdiction of this court in cases of *habeas corpus* is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception.
>
> We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.
>
> What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.

Id. at 513-514.[8]

[8] *McCardle*'s discussion of the Exceptions and Regulations Clause is consistent with opinions issued before and since. The Court has made the point in different ways. See, *e.g.*, *United States* v. *More*, 7 U.S. (3 Cranch) at 173; *Durousseau*, 10 U.S. (6 Cranch) at 314 ("The appellate powers of this court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject."); *Barry* v. *Mercein*, 46 U.S. (5 How.) 103, 119 (1847) ("By the constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress."); *Daniels* v. *Railroad Co.*, 70 U.S. (3 Wall.) 250, 254 (1866) ("[I]t is for Congress to determine how far, within the limits of the capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law. In these respects

The *McCardle* Court concluded its opinion with the following observation:

> Counsel [see 74 U.S. (7 Wall.) at 509-510 (argument for the appellant)] seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.

74 U.S. (7 Wall.) at 515. The Court thus made clear that the 1868 Act did not divest this Court of any jurisdiction that it had possessed before the 1867 Act was passed—in particular, the jurisdiction conferred by the Judiciary Act of 1789 to entertain original petitions for habeas corpus filed by persons held "under or by colour of the authority of the United States." Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81-82. The following year in *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869), the Court unanimously confirmed that it retained jurisdiction to entertain such original habeas corpus petitions. While the Court noted that the jurisdiction-stripping provision of the 1868 Act at issue in *McCardle* "was, doubtless, within the constitutional discretion of Congress," *id.* at 104, the Court also held that the 1868 Act was

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it is wholly the creature of legislation."); *St. Louis, I.M. & S. Ry.* v. *Taylor*, 210 U.S. 281, 292 (1908) ("Congress has regulated and limited the appellate jurisdiction of this court over the state courts * * *, and our jurisdiction in this respect extends only to the cases there enumerated, even though a wider jurisdiction might be permitted by the constitutional grant of power.").

inapplicable by its terms to the Court's original habeas jurisdiction, *id.* at 105.

3. *McCardle* and *Yerger* indicate that Section 106(b)(3)(E)'s restriction on this Court's certiorari jurisdiction is constitutional. As in those cases, Congress has limited appellate review of habeas corpus decisions made in the lower federal courts, while leaving open original habeas corpus actions filed in this Court. See Section II.A, *infra*. Indeed, while common usage—as reflected in this Court's framing of the second question presented—calls petitions for habeas corpus filed directly in this Court by persons incarcerated under a judgment of conviction "original" petitions, for purposes of Article III, the Court's jurisdiction to consider such petitions is appellate.[9] Moreover, both in considering original habeas actions and in reviewing lower court determinations on second or successive petitions that *are* authorized for filing, the Court may interpret the substantive provisions of Title I. It is true that the Court will have no opportunity to announce (except in dicta) the requirements for a "prima facie showing that the application satisfies the requirements of this subsection," § 106(b)(3)(C), because the court of appeals'

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[9] As Chief Justice Marshall explained, the jurisdiction over such a habeas petition filed in this Court "is clearly *appellate*. It is the revision of a decision of an inferior court, by which a citizen has been committed to jail." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807) (emphasis added). Accord, *e.g.*, *Ex parte Siebold*, 100 U.S. 371, 374 (1880). The consequences of so characterizing the Court's jurisdiction are that (1) the statutory authorization for the Court to entertain such petitions does not expand the Court's "original" jurisdiction in violation of Article III, see *Bollman*, 8 U.S. (4 Cranch) at 100-101 (distinguishing *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803)); and (2) the Court's authority to issue the writ is subject to the Exceptions and Regulations Clause, see *Siebold*, 100 U.S. at 374-375.

determination that a habeas petitioner has or has not made out a "prima facie showing" is not subject to review on certiorari, § 106(b)(3)(E). But the Court's lack of opportunity to articulate the rules applicable to that narrow "gatekeeping" function does not amount to an unconstitutional restriction of its jurisdiction, given that the Court retains jurisdiction to engage in substantive review of original habeas corpus petitions filed in this Court.

C. Section 106(b)(3)(E) Is Consistent With Theories Articulating Constitutional Limits On The Exceptions And Regulations Clause

The question whether any limitations exist on Congress's power under the Exceptions and Regulations Clause to restrict the jurisdiction of this Court raises difficult constitutional issues. Separation of powers concerns, the Supremacy Clause, and the Court's historic role as expositor of federal law all may influence the delineation of the limits, if any, on Congress's authority. In light of the broad sweep of the Court's jurisdiction under current law, this Court has not recently addressed those issues. Legislative consideration of various jurisdiction-stripping proposals, however, has precipitated considerable scholarly discussion of the subject. Under any of the prevailing theories, Title I of the Act is constitutional.

1. Some scholars have concluded that Article III places no constraints whatever on Congress's authority to limit this Court's appellate jurisdiction. See, *e.g.*, Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 Vill. L. Rev. 1030, 1038-1041 (1982); Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 Stan. L. Rev. 895 (1984); Van Alstyne, *A Critical Guide to Ex parte McCardle*, 15 Ariz. L. Rev. 229, 260 (1973); Wechsler, *The Courts and the Constitution*, 65 Colum. L. Rev. 1001, 1005-1006 (1965). On that view, Congress's delineation of this Court's appellate jurisdiction is subject to restraint only under independent constitutional principles. There is, for example, general agreement that Congress could not constitutionally restrict the Court's appellate jurisdiction based on a suspect classification such as race or religion. See, *e.g.*, Gunther, *supra*, 34 Stan. L. Rev. at 916-917; Van Alstyne, *supra*, 15 Ariz. L. Rev. at 263. Section 106(b)(3)(E) obviously implicates no such suspect classification.

2. Other scholars, while acknowledging congressional authority to devise "Exceptions" to this Court's appellate jurisdiction, have argued that Congress may not exercise that authority in such a manner as to prevent the Court from performing its "core" or "essential" functions within the constitutional structure. See, *e.g.*, *Hart, The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1365 (1953) ("[T]he exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan."); Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 Vill. L. Rev. 929, 957 (1981-1982) ("a plenary exceptions-and-regulations power is not consistent with the constitutional plan"; rather, "the clause authorizes jurisdictional exceptions and regulations by Congress that are not inconsistent with the Court's essential constitutional functions"). That view was more recently articulated by

then-Attorney General William French Smith. See 128 Cong. Rec. 9093 (1982) (letter from Attorney General William French Smith to Senator Strom Thurmond) ("Congress may not, however, consistent with the Constitution, make 'exceptions' to Supreme Court jurisdiction which would intrude upon the core functions of the Supreme Court as an independent and equal branch in our system of separation of powers.").

Judged under those approaches, Title I is constitutional. Title I leaves intact this Court's certiorari jurisdiction on direct appeal from both state and federal criminal convictions, its certiorari jurisdiction on state and first federal habeas, and its continuing authority to entertain original petitions for habeas corpus. Those avenues of review ensure that the Court can continue to serve as expositor of the federal constitutional rules governing criminal prosecutions. Contrary to petitioner's suggestion (see Pet. 8), moreover, Section 106(b)(3)(E) will not prevent this Court from construing Title I's new substantive requirements (see Section 106(b)(2)(A) and (B)) governing second and successive federal habeas petitions. Where the court of appeals grants leave to file a second or successive petition for habeas corpus in the district court, the district court's eventual decision to grant or deny the petition will be appealable, and ultimately subject to certiorari review. Original habeas petitions may also be filed in this Court. Thus, questions concerning the proper construction of Section 106(b)(2)(A) and (B) will not permanently evade this Court's scrutiny.

3. Other scholars have expressed the view that *some* federal court must be empowered to exercise jurisdiction over every case in which a federal (or at least a federal constitutional) claim is raised. See

Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 67 (1981) ("Some effective form of federal judicial review under article III must be available for claims of constitutional right."); Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205, 211 (1985) ("[T]he judicial power of the United States must extend to certain cases, and must be vested—in either original or appellate form—somewhere in the federal judiciary."); cf. *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 331 (1816) (Story, J.) ("[T]he whole judicial power of the United States should be, at all times, vested, either in an original or appellate form, in some courts created under its authority.").

Section 106 does not run afoul of that proposed principle. State prisoners challenging the constitutionality of their convictions or sentences have multiple opportunities to raise their claims in federal court.[10] Even if a second or successive habeas petition is thought to constitute a distinct case for which a federal forum must be available, the statute permits the court of appeals to exercise jurisdiction to determine whether the petitioner has established a prima facie case of entitlement to relief. And Title I of the Act does not divest this Court of jurisdiction to entertain original petitions for habeas corpus, even where state prisoners have previously sought and been denied federal habeas corpus relief. See Section II.A, *infra*.

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[10] Indeed, as the petition acknowledges (see Pet. 4-5), petitioner has filed three previous petitions for certiorari challenging the validity of his conviction, and was denied relief on the merits of his first federal habeas petition by the district court and the court of appeals.

II. TITLE I OF THE ACT DOES NOT DIVEST THIS COURT OF JURISDICTION TO ENTERTAIN ORIGINAL PETITIONS FOR WRITS OF HABEAS CORPUS, BUT TITLE I DOES AFFECT THE SUBSTANTIVE STANDARDS GOVERNING THE COURT'S EXERCISE OF THAT JURISDICTION

A. This Court Retains Authority To Entertain "Original" Petitions For Habeas Corpus

Section 2241(a) of Title 28 provides that "[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." Section 2254(a) of that Title states:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. 2254(a).[11] Those provisions were not amended by Title I of the Act. They provide clear statutory authorization for this Court to entertain "original" petitions for habeas corpus filed by prisoners in state custody pursuant to a judgment of conviction.

Nothing in Title I purports to divest the Court of jurisdiction to entertain original petitions for habeas corpus in appropriate cases. Section 106(b)(3)'s

[11] Section 2242 of Title 28 requires that, "[i]f addressed to the Supreme Court, a justice thereof or a circuit judge [a petition for habeas corpus] shall state the reasons for not making application to the district court of the district in which the applicant is held." Rule 20.4(a) of the Rules of this Court contains the same requirement.

"screening" provisions governing second and successive petitions for habeas corpus do not apply to habeas petitions filed in this Court. Section 106(b)(3)(A) states that, "[b]efore a second or successive application permitted by this section is filed *in the district court*, the applicant shall move in the appropriate court of appeals for an order authorizing *the district court* to consider the application" (emphasis added). Section 106(b)(3)(B) similarly provides that "[a] motion in the court of appeals for an order authorizing *the district court* to consider a second or successive application shall be determined by a three-judge panel of the court of appeals" (emphasis added). The requirement that a petitioner obtain leave from the court of appeals before filing a second or successive petition is thus inapplicable by its terms to petitions filed in this Court. Application of those "gatekeeping" provisions to this Court's exercise of its own jurisdiction, moreover, would effect an anomalous inversion of the federal judicial hierarchy. Particularly in light of Congress's failure to amend 28 U.S.C. 2241(a) and 2254(a), which grant this Court express statutory authorization to entertain habeas petitions filed by prisoners in state custody pursuant to a judgment of conviction, the limitations imposed by Section 106(b)(3)(A) and (B) should not be expanded beyond their apparent meaning.

Nor does Section 106(b)(3)(E) limit this Court's jurisdiction to entertain original habeas petitions. Section 106(b)(3)(E) divests this Court of jurisdiction to review, by appeal or writ of certiorari, a court of appeals' decision granting or denying leave to file a second or successive petition. It does not refer to this Court's original habeas jurisdiction, nor does it purport to amend Sections 2241(a) and 2254

(a) of Title 28. This Court has repeatedly emphasized that, "where two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1018 (1984) (internal quotation marks omitted). Congress's determination that the court of appeals' performance of its "gatekeeping" function with respect to second and successive petitions should not be subject to certiorari review may readily "co-exist" with continuing authorization for this Court to entertain original petitions for habeas corpus in extraordinary cases.

Again, *Ex parte Yerger*, *supra*, is relevant. At issue in *Yerger* was the same 1868 statute involved in *Ex parte McCardle*, which eliminated this Court's appellate jurisdiction over circuit court orders denying petitions for habeas corpus. See Section I.B.2, *supra*. The Court held that the divestiture of appellate jurisdiction effected by the Act should be confined to its terms and should not be construed as eliminating the Court's authority to entertain original petitions for habeas corpus. 75 U.S. (8 Wall.) at 104-106. The same analysis applies here; Section 106(b)(3)(E) does not implicitly oust the Court's jurisdiction to entertain original habeas petitions.

B. The Substantive Standards In Section 106 Of Title I Of The Act Governing Second And Successive Habeas Petitions Are Applicable To Petitions For Habeas Corpus Filed In This Court

Section 106(b)(1) and (2) of the Act sets forth substantive standards governing second or successive habeas petitions filed in federal court:

> (1) A claim presented in a second or successive habeas corpus application under section 2254 [of Title 28] that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. 2244(b)(1) and (2). While Congress expressly limited the "gatekeeping" provision of Section 106(b)(3) to habeas applications "filed in the district court," 28 U.S.C. 2244(b)(3)(A), the substantive standards applicable to second and successive petitions for habeas corpus are generally applicable to petitions filed under 28 U.S.C. 2254. In our view, those standards thus apply to second or successive petitions filed as original matters in this Court.[12]

[12] Because, in our view, the substantive requirements of Section 106 bar the second or successive habeas petition filed by petitioner, see Section III.B., *infra*, we do not address whether other substantive or procedural provisions in Title I of the Act apply to original habeas petitions filed in the Supreme Court. Nor do we consider the construction or constitutionality of these provisions.

The applicability of Section 106(b)(2)'s substantive standards to original petitions filed in this Court is required by the language of the Act. A petition for habeas corpus filed in this Court by a prisoner in state custody constitutes a "habeas corpus application under section 2254." Section 2254(a) states:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court.

28 U.S.C. 2254(a).[13] Section 106(b)(2), in turn, states that a second or successive application under Section 2254 "shall be dismissed unless" the statutory criteria are satisfied. 28 U.S.C. 2244(b)(2). The text of the Act thus makes clear that the substantive standards of Section 106(b)(2)(A) and (B) apply to all habeas petitions filed under Section 2254 by state prisoners who have previously been denied federal habeas relief, including petitions that invoke this Court's jurisdiction to entertain original petitions for habeas corpus. Indeed, a contrary reading of the Act would create an incentive for second or successive habeas petitioners to bypass the lower courts whenever their inability to satisfy the requirements of Section 106(b)(1) and (2) was apparent.

We note that, although this Court is authorized to entertain a second or successive petition for habeas corpus, Rule 20.4(a) of the Rules of this Court states

[13] See also Rule 20.4(a) ("If the relief sought is from the judgment of a state court, the petition shall set out specifically how and where the petitioner has exhausted available remedies in the state courts or otherwise comes within the provisions of 28 U.S.C. § 2254(b).").

that "[t]o justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court." The Rule further provides that "[t]his writ is rarely granted." *Ibid.* Experience has confirmed that admonition; this Court most recently granted an original petition for a writ of habeas corpus more than 70 years ago, in *Ex parte Grossman*, 267 U.S. 87 (1925). See Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 Sup. Ct. Rev. 153, 153-154 & n.3; Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* 502 (7th ed. 1993).

III. APPLICATION OF THE ACT IN THIS CASE IS NOT A SUSPENSION OF THE WRIT OF HABEAS CORPUS

The Suspension Clause of the Constitution, Art. I, § 9, Cl. 2, provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Because there is currently no "Rebellion or Invasion," a suspension of the writ at this time would be unconstitutional. The question presented here is whether Title I of the Act, as applied to this case, so vitiates petitioner's right to obtain habeas corpus relief that it amounts to such a suspension. In light of the historic limitations imposed by Congress and decisions of this Court on second and successive petitions for habeas corpus, the restrictions placed by the Act on petitioner's second or successive habeas corpus petition do not violate the Suspension Clause.

A. The Evolution Of Habeas Corpus Reflects No Absolute Protection Under The Suspension Clause For A State Prisoner's Claim For Relief Based On Procedural Errors At His Trial Raised On A Second Or Successive Habeas Application

1. This Court noted in *McCleskey* v. *Zant*, 499 U.S. 467 (1991), that, "[i]n the early decades of our new federal system, English common law defined the substantive scope of the writ." *Id.* at 478 (citing *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830)). Under the common law, "prisoners could use the writ to challenge confinement imposed by a court that lacked jurisdiction, or detention by the Executive without proper legal process." *Ibid.* (citation omitted). Accord *Schlup* v. *Delo*, 115 S. Ct. 851, 862 (1995) ("[T]he writ originally performed only the narrow function of testing either the jurisdiction of the sentencing court or the legality of Executive detention.").

In *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830), the Court stated that the term "habeas corpus" is "used in the constitution, as one which was well understood." *Id.* at 201. Under that understanding, the "great object" of the writ is "the liberation of those who may be imprisoned without sufficient cause." *Id.* at 202. Addressing the question whether "the judgment of a court of competent jurisdiction * * * is * * * in itself sufficient cause," *ibid.*, the Court explained:

> A judgment, in its nature, concludes the subject on which it is rendered, and pronounces the law of the case. The judgment of a court of record, whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court, as it is on other courts. It puts an end to inquiry concerning the fact, by deciding it.

Id. at 202-203. See also *Ex parte Kearney*, 20 U.S. (7 Wheat.) 38, 42-43 (1822).

This Court has repeatedly reaffirmed its understanding that postconviction habeas relief was available at common law only to test the jurisdiction of the committing court. See, *e.g.*, *Preiser* v. *Rodriguez*, 411 U.S. 475, 485 (1973) (Under "[t]he original view," the "relevant inquiry was confined to determining simply whether or not the committing court had been possessed of jurisdiction."); *United States* v. *Hayman*, 342 U.S. 205, 211 (1952) ("at common law a judgment of conviction rendered by a court of general criminal jurisdiction was conclusive proof that confinement was legal" and "[s]uch a judgment prevented issuance of the writ without more"); *Yerger*, 75 U.S. (8 Wall.) at 101 (writ "did not extend to cases of imprisonment after conviction, under sentences of competent tribunals"). See also *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 254-256 (1973) (Powell, J., concurring); *Sanders* v. *United States*, 373 U.S. 1, 29 (1963) (Harlan, J., dissenting).[14]

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[14] The exception to that line of cases is *Fay* v. *Noia*, 372 U.S. 391 (1963). There, this Court suggested that *Bushell's Case*, 124 Eng. Rep. 1006, 1016 (1670), stands for the proposition that "habeas was available to remedy any kind of governmental restraint contrary to fundamental law." 372 U.S. at 405. In *Bushell's Case*, jurors who acquitted the defendants in a criminal case in contravention of the direction of the court were themselves committed to prison for contempt of court. The jurors were then released on a writ of habeas corpus by the Court of Common Pleas. The failure to obey a court's direction to return a verdict of guilty, however, may not have

2. As a matter of statutory law in this country, Congress provided no federal habeas corpus remedy for prisoners held in state custody until 1867. In the Judiciary Act of 1789, ch. 20, 1 Stat. 73, Congress vested the federal courts with jurisdiction to issue the writ of habeas corpus, but specifically excluded relief at the behest of state prisoners. The Act provided "[t]hat writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." § 14, 1 Stat. 82. With limited exceptions for narrow classes of cases in 1833 and 1842,[15] state prisoners remained outside of the ambit

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been a possible basis for a contempt citation at the time of *Bushell's Case* or since, see 124 Eng. Rep. at 1012 ("[T]he jury cannot go against [the judge's] direction in law, for he could not direct."), and the scope of review of a contempt citation may have been broader than that of a criminal conviction, because the defendant had no right to jury trial on a contempt citation, see *id.* at 1010 ("The cases [of contempt and felony] are not alike."). It has thus been said that "one searches the *Bushell* opinion in vain for support of the proposition" in *Fay*. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451, 467 (1966).

[15] See Act of Mar. 2, 1833, ch. 57, § 7, 4 Stat. 634-635 (extending relief to prisoners "committed or confined on, or by any authority or law, for any act done, or omitted, to be done, in pursuance of a law of the United States, or any order, process, or decree, of any judge or court thereof"); Act of Aug. 29, 1842, ch. 257, 5 Stat. 539-540 (extending relief to prisoners who are "subjects or citizens of a foreign State, and domiciled therein," and held under state law).

of federal habeas relief for 78 years, until Congress expanded the scope of habeas relief in 1867.[16]

3. Although the Court has referred to the Suspension Clause from time to time, it has been the subject of only one decision of this Court. *Swain* v. *Pressley*, 430 U.S. 372 (1977). That case involved a Suspension Clause challenge to a statute that abolished habeas review for prisoners in custody under sentences imposed by the District of Columbia Superior Court. In its place, Congress substituted a procedure for postconviction relief in the local (*i.e.*, non-Article III) courts, followed by the possibility of this Court's review on certiorari of the results of that process. This Court upheld the constitutionality of the statute, explaining "that the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus." *Id.* at 381. Cf. *United States* v. *Hayman*, 342 U.S. at 223 (holding that 28 U.S.C. 2255 motion in district of conviction is adequate substitute for habeas corpus for federal prisoners).

In *Swain*, the United States argued that "the Constitution's history shows that the framers did not understand the privilege [of the writ of habeas corpus] to extend to collateral attacks upon criminal convictions. Accordingly, limitations upon the nature and scope of post-conviction collateral relief do not implicate the Suspension Clause." Brief for the Peti-

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[16] See Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (extending habeas relief to "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States").

tioners at 63 (No. 75-811); see *Swain*, 430 U.S. at 380 ("The Government * * * contends that the constitutional provision merely prohibits suspension of the writ as it was being used when the Constitution was adopted; at that time the writ was not employed in collateral attacks on judgments entered by courts of competent jurisdiction."). The Court, however, did not reach that issue in *Swain*, because it was able to rest its decision on a narrower ground, *i.e.*, that Congress had provided an adequate and effective substitute postconviction remedy for the habeas remedy that it had withdrawn for District of Columbia prisoners. *Id.* at 381.

As in *Swain*, it is again unnecessary to consider whether the Suspension Clause is limited to protecting the writ as it existed in 1789.[17] Similarly, it is

[17] That issue would require resolution of several difficult issues. First, it would call for resolution of the "divergent discussions of the historic role of federal habeas corpus" voiced by commentators. *Wainwright* v. *Sykes*, 433 U.S. 72, 77 n.6 (1977). Second, it would require analysis of the meaning of "jurisdiction" in habeas law. While the Court has often stated that, at common law, a habeas court had no authority to issue the writ for a prisoner confined under the judgment of a court of competent jurisdiction, the concept of "jurisdiction" itself in the cases construing the federal habeas statute was the subject of considerable growth and evolution. See, *e.g.*, *McClesky* v. *Zant*, 499 U.S. at 478-479; *Wainwright* v. *Sykes*, 433 U.S. at 79; cf. *Custis* v. *United States*, 114 S. Ct. 1732, 1738 (1994); *id.* at 1745 (Souter, J., dissenting). It is open to debate how much of that evolution might be protected under the Suspension Clause. Third, to the extent that modern practice might be protected, it would implicate the debate about the precise relationship "between the classical common-law writ of habeas corpus and the remedy provided in 28 U.S.C. § 2254"—an issue that has occasioned "[s]harp division within the Court * * * on more than one aspect of the perplexing problems which have been litigated in this connection." *Wainwright* v. *Sykes*, 433 U.S. at 78.

unnecessary to consider whether, in view of Congress's failure to authorize any general right of federal habeas corpus for state prisoners from the founding of this Nation until 1867, the Suspension Clause can be read to afford *any* protection to state prisoners. Compare, *e.g.*, Jordan Steiker, *Incorporating the Suspension Clause: Is There A Constitutional Right To Federal Habeas Corpus For State Prisoners*, 92 Mich. L. Rev. 862, 865, 893 (1994) (supporting expansive right of habeas corpus in the federal courts, but indicating that the Suspension Clause, as originally framed, was not intended to and did not protect the right of state prisoners to obtain federal habeas relief), with James Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* 35, 40, 74 & n.313 (2d ed. 1994 & Supp. 1995) (theorizing that the Judiciary Act's provision of review of state prisoners' convictions by writ of error in the Supreme Court, see Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 85-87, was an adequate substitute for habeas relief and thereby satisfied the Suspension Clause).[18]

[18] We note that it is doubtful that the theory of Liebman and Hertz could be of any assistance to petitioner, who—like a state prisoner under the Judiciary Act of 1789—has already had the opportunity for Supreme Court review (albeit by writ of certiorari, not appeal) of his criminal conviction and his state habeas proceeding. A comparable form of review was available in *Swain*, and the procedures in that case were held sufficient to satisfy the Suspension Clause. 430 U.S. at 382 n.16.

The Court need not reach those issues here, because petitioner is pursuing a second or successive habeas petition that the Act bars based on reasonable principles of finality. Such principles have long been a feature of federal habeas law, and have never been thought inconsistent with the Constitution. Thus, as we explain below, the application of the Act in this case does not violate the Suspension Clause.

B. The Suspension Clause Does Not Require The Federal Courts To Provide An Unregulated Opportunity For Habeas Relief On Second Or Successive Petitions

Petitioner is pursuing a second, not a first, federal habeas petition. Cf. *Lonchar* v. *Thomas*, 116 S. Ct. 1293 (1996). This Court and Congress have long recognized that principles of finality have an important role to play in habeas corpus litigation. The content of those principles has varied over time, and the Act once again alters the standards applicable to second and successive petitions. Nonetheless, the consistent recognition by this Court and Congress that principles of finality are applicable to habeas litigation demonstrates that the Act's further refinement of those principles, in the context of this case, does not violate the Suspension Clause.

Petitioner advances two substantive claims. First, he alleges that the jury instructions at his trial were erroneous, because they misdefined the "beyond a reasonable doubt" standard, thereby permitting the jury to convict on the basis of a lighter burden of proof. Pet. 13-21. Second, he alleges that the evidence presented by a state employee regarding the time of death of the victim was inadmissible. Pet.

21-32. He seeks leave to litigate both of those claims in a second federal habeas petition. The court of appeals held that the Act bars those claims. That result does not infringe the Suspension Clause.

1. As this Court has recognized, principles of res judicata did not apply to habeas corpus at common law, and a habeas petition, once denied by one court, "could be made to every other judge or court in the realm, and each court or judge was bound to consider the question of the prisoner's right to a discharge independently, and not to be influenced by the previous decisions refusing discharge." *McCleskey* v. *Zant*, 499 U.S. at 479 (quoting W. Church, *Writ of Habeas Corpus* § 386, at 570 (2d ed. 1893)); see also *Sanders* v. *United States*, 373 U.S. 1, 7 (1963). The reason for such a liberal rule was that the denial of a habeas petition was not considered appealable. Therefore, successive habeas petitions to a different (usually, higher) court had to do the service of an appeal.

After appellate review of habeas decisions became available in this country, some lower courts began to question the validity of the common law rule allowing indefinite numbers of successive petitions. See *McCleskey*, 499 U.S. at 479-480; *Ex parte Cuddy*, 40 F. 62 (C.C.S.D. Cal. 1889) (Field, Circuit Justice). Recognizing that it was departing from the common law rule, the Court in *Salinger* v. *Loisel*, 265 U.S. 224, 230-231 (1924), explained that, "when a refusal to discharge was not open to appellate review, courts and judges were accustomed to exercise an independent judgment on each successive application, regardless of the number." "[W]hen," however, "a right to an appellate review was given the reason

for that practice ceased and the practice came to be materially changed." *Id.* at 231. The Court held, therefore, that "a sound judicial discretion" controls the decision whether to permit a second or successive application, and that "[a]mong the matters which may be considered, and even given controlling weight, are (a) the existence of another remedy, such as a right in ordinary course to an appellate review in the criminal case, and (b) a prior refusal to discharge on a like application." *Ibid.* See also *Wong Doo* v. *United States*, 265 U.S. 239, 241 (1924) (holding that in some circumstances discretion must be exercised to deny a successive petition as abusive); cf. *Price* v. *Johnston*, 334 U.S. 266, 289 (1948) (more flexible standard applied to new claim raised in second or subsequent petition).

When Congress enacted the revision of the Judicial Code in 1948, it codified the result in *Salinger* and *Wong Doo* in former 28 U.S.C. 2244. That statute provided that "[n]o circuit or district judge shall be required to entertain an application for a writ of habeas corpus * * * if it appears that the legality of [the applicant's] detention has been determined * * * on a prior application * * * and the petition presents no new ground * * * and the judge or court is satisfied that the ends of justice will not be served by such inquiry." Act of June 25, 1948, ch. 646, § 1, 62 Stat. 965 (codified at 28 U.S.C. 2244 (1952)).

2. In *Sanders* v. *United States*, 373 U.S. 1 (1963), this Court distinguished between "successive" petitions, which present claims already raised in a previous federal habeas petition, and "abusive" petitions, which present claims that have not previously been raised in a federal habeas petition. The Court held that successive petitions are governed by the "ends

of justice" inquiry derived from *Salinger* and codified in then-Section 2244, see 373 U.S. at 12, 17, while a petition will be found to be abusive only if the government can demonstrate, under traditional equitable principles, that the "suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks," *id.* at 17.

In 1966, following *Sanders*, Congress provided that "a subsequent application for a writ of habeas corpus * * * need not be entertained" unless it is "predicated on a * * * ground not adjudicated on the hearing of the earlier application" and "the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ." Act of Nov. 2, 1966, Pub. L. No. 89-711, § 1, 80 Stat. 1104. Congress's purpose in adopting that amendment was "to introduce 'a greater degree of finality of judgments in habeas corpus proceedings.'" *Kuhlmann* v. *Wilson*, 477 U.S. 436, 450 (1986) (plurality opinion) (quoting S. Rep. No. 1797, 89th Cong., 2d Sess. 2 (1966)). Rule 9(b) of the Rules Governing Section 2254 Cases, which was enacted by Congress in 1976, Act of July 8, 1976, Pub. L. No. 94-349, § 2, 90 Stat. 822, as amended by Act of Sept. 28, 1976, Pub. L. No. 94-426, § 2(8), 90 Stat. 1335, similarly provides that "[a] second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ."

Following the 1966 amendment to Section 2244 and the 1976 enactment of Rule 9(b), this Court

clarified the standards imposed by those provisions for second and successive petitions. As the Court summarized, "[u]nless a habeas petitioner shows cause and prejudice, a court may not reach the merits of: (a) *successive claims* that raise grounds identical to grounds heard and decided on the merits in a previous petition, [or] (b) new claims, not previously raised, which constitute an *abuse of the writ*." *Sawyer* v. *Whitley*, 505 U.S. 333, 338 (1992) (citations omitted). A federal court may hear a second or subsequent claim that fails to satisfy those standards only if the prisoner "establish[es] that under the probative evidence he has a colorable claim of factual innocence." *Id.* at 339 (quoting *Kuhlmann* v. *Wilson*, 477 U.S. at 454 (plurality opinion)); see also *Schlup* v. *Delo*, 115 S. Ct. 851, 867 (1995).

3. In view of the above, the Suspension Clause cannot be read to prohibit the application of reasonable principles of finality to habeas corpus petitions. While successive petitions were permitted under the common law because of the absence of appellate review of habeas decisions, when appellate review became available and the scope of the writ changed, Congress and this Court both applied new principles of finality to the writ without any suggestion that to do so violated the Suspension Clause. Indeed, even the *Sanders* decision itself, which briefly adverted to the possibility of a constitutional issue if habeas relief were limited by strict notions of res judicata, see 373 U.S. at 8, 11-12, recognized that habeas petitions may be dismissed for failure to comport with principles of finality that would have been unknown at common law. *Id.* at 15-16. Since *Sanders*, actions by both Congress and this Court have reinforced that conclusion.

Title I of the Act once again alters the principles of finality applicable to habeas petitions. Before the Act, once the government had pleaded abuse of the writ, a prisoner like petitioner who sought to bring a second habeas petition advancing claims not advanced on his first habeas petition would have to make one of two showings. Either he would have to establish "cause for failing to raise [his claim in previous petitions] and prejudice therefrom," *McCleskey*, 499 U.S. at 494, or he would have to "show that a fundamental miscarriage of justice would result from a failure to entertain the claim," *id.* at 495. The Court has said that the latter requirement is satisfied by a 'colorable showing of factual innocence." *Ibid.* (quoting *Kuhlmann* v. *Wilson*, 477 U.S. at 454 (plurality opinion)).

The Act modifies the judicially established requirements that a second or subsequent habeas petition must satisfy; it reflects Congress's balancing of the competing policy considerations. Cf. *Lonchar* v. *Thomas*, 116 S. Ct. at 1298 ("These legal principles [regarding the availability of habeas] are embodied in statutes, rules, precedents, and practices that control the writ's exercise. Within constitutional constraints they reflect a balancing of objectives (sometimes controversial), which is normally for Congress to make, but which courts will make when Congress has not resolved the question."). The Act sets forth two sets of requirements in the alternative, each of which has a "cause" and a "prejudice" component.

First, under Section 106(b)(2)(A), a petitioner may bring a second or successive habeas petition based on a "new rule of constitutional law" that was "previously unavailable" (cause). He must also show a form of prejudice—that the rule he seeks to invoke

was "made retroactive to cases on collateral review by the Supreme Court," *i.e.*, a showing that the new constitutional rule is so fundamental that it is available to a petitioner on postconviction collateral review. See *Teague* v. *Lane*, 489 U.S. 288, 311-314 (1989) (plurality opinion).

Second, under Section 106(b)(2)(B), a petitioner may bring a second or successive habeas petition based on newly discovered facts if "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" (cause) and if "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense" (prejudice).[19]

4. Those requirements of Section 106, as applied to petitioner's claims, do not violate the Suspension Clause. As shown above, the requirements of the Act are parallel to, though different from, the requirements of prior law. Those requirements provide a generally reasonable formulation of finality principles. Their application to the claims asserted by petitioner raises no Suspension Clause problems.[20]

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[19] Section 106(b)(2)(B) also adopts the *Sawyer* v. *Whitley* "clear and convincing" standard rather than the *Schlup* v. *Delo* "probably resulted" standard for measuring the likelihood of actual innocence. See *Sawyer*, 505 U.S. at 348-350; *Schlup*, 115 S. Ct. at 866-867.

[20] No Suspension Clause issue is posed by Section 106(b)(3)(E)'s preclusion of Supreme Court review of a court of appeals' refusal to permit the filing of a second or successive petition in district court. It has been clear since *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), that the existence of original habeas jurisdiction in the Supreme Court is sufficient to satisfy the requirements of the Suspension Clause. Because the Act provides for such jurisdiction even in cases in which the court of appeals refuses to permit the petitioner to file a second or successive habeas petition in district court, see Section II.A, *supra*, the preclusion of Supreme Court review of the court of appeals' decision is of no consequence under the Suspension Clause.

The court of appeals held that Section 106(b) bars petitioner's claim that the jury instructions were constitutionally erroneous because they diluted the "beyond a reasonable doubt" standard. Pet. App. 25-26. As the court of appeals explained, that claim was certainly available to petitioner on his first federal habeas petition, *ibid.*, and it was also available on direct review of his conviction. Although Congress may choose to permit such a bypassed claim to be adjudicated on its merits on a second federal habeas petition, nothing in the Suspension Clause requires that it permit that kind of disregard of ordinary principles of finality.

Petitioner's other claim is that he is actually innocent, as shown by new affidavits prepared by newly hired experts, and that his trial violated the Eighth and Fourteenth Amendments because a non-physician agent of the State was permitted to testify regarding the date on which the victim died. Pet. 21-32. Although petitioner may not have gathered the precise affidavits that he now presents to the federal courts, he had ample opportunity to gather, and in fact did gather, at the time of his trial substantial other evidence regarding the date of death issue, which he presented to the jury. Pet. App. 31-33. Because ordinary and reasonable principles of finality are entirely consistent with the Suspension Clause, Congress may refuse to permit collateral relitigation of such

routine factual issues based on the kind of entirely cumulative evidence that petitioner presents. Similarly, insofar as petitioner's claim is that the trial court made erroneous—or even constitutionally impermissible—evidentiary rulings, he had the opportunity to litigate his claims regarding those rulings on direct review, on his first state habeas petition, and on his first federal habeas petition. See Pet. App. 25-26. Again, although Congress could permit complete disregard of ordinary rules of finality on habeas corpus, nothing in the Suspension Clause requires Congress to permit a defendant who does not make an available claim of this sort in a prior proceeding to demand an adjudication on the merits on a second federal habeas petition.

CONCLUSION

The petition for a writ of certiorari should be dismissed.

Respectfully submitted.

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Article I, Section 9, Clause 2, of the U.S. Constitution (the Suspension Clause), provides:

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

2. Article III of the U.S. Constitution provides, in relevant part:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

* * * * *

3. Title I of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1217, provides:

TITLE I—HABEAS CORPUS REFORM

SEC. 101. FILING DEADLINES

Section 2244 of title 28, United States Code, is amended by adding at the end the following new subsection:

"(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a

State court. The limitation period shall run from the latest of—

"(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

"(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

"(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

"(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

"(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.".

SEC. 102. APPEAL.

Section 2253 of title 28, United States Code, is amended to read as follows:

"Sec. 2253. Appeal

"(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the

final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

"(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

"(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

"(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

"(B) the final order in a proceeding under section 2255.

"(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

"(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).".

SEC. 103. AMENDMENT OF FEDERAL RULES OF APPELLATE PROCEDURE.

Rule 22 of the Federal Rules of Appellate Procedure is amended to read as follows:

"Rule 22. Habeas corpus and section 2255 proceedings

"(a) APPLICATION FOR THE ORIGINAL WRIT.—An application for a writ of habeas corpus

shall be made to the appropriate district court. If application is made to a circuit judge, the application shall be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge shall not be permitted. The applicant may, pursuant to section 2253 of title 28, United States Code, appeal to the appropriate court of appeals from the order of the district court denying the writ.

"(b) CERTIFICATE OF APPEALABILITY.—In a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of appealability pursuant to section 2253(c) of title 28, United States Code. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of appealability or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a State or its representative, a certificate of appealability is not required.".

SEC. 104. SECTION 2254 AMENDMENTS.

Section 2254 of title 28, United States Code, is amended—

(1) by amending subsection (b) to read as follows:

"(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

"(A) the applicant has exhausted the remedies available in the courts of the State; or

"(B)(i) there is an absence of available State corrective process; or

"(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

"(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

"(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.";

(2) by redesigning subsections (d), (e), and (f) as subsections (e), (f), and (g), respectively;

(3) by inserting after subsection (c) the following new subsection:

"(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the

merits in State court proceedings unless the adjudication of the claim—

"(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

"(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.";

(4) by amending subsection (e), as redesignated by paragraph (2), to read as follows:

"(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

"(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

"(A) the claim relies on—

"(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

"(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

"(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."; and

(5) by adding at the end the following new subsections:

"(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

"(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.".

SEC. 105. SECTION 2255 AMENDMENTS.

Section 2255 of title 28, United States Code, is amended—

(1) by striking the second and fifth undesignated paragraphs; and

(2) by adding at the end the following new undesignated paragraphs:

"A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

"(1) the date on which the judgment of conviction becomes final;

"(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action:

"(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

"(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

"Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

"A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

"(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

"(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.".

SEC. 106. LIMITS ON SECOND OR SUCCESSIVE APPLICATIONS.

(a) CONFORMING AMENDMENT TO SECTION 2244(a).—Section 2244(a) of title 28, United States Code, is amended by striking "and the petition" and all that follows through "by such inquiry." and inserting ", except as provided in section 2255.".

(b) LIMITS ON SECOND OR SUCCESSIVE APPLICATIONS.—Section 2244(b) of title 28, United States Code, is amended to read as follows:

"(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

"(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

"(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

"(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

"(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

"(3)(A) Before a second or successive application permitted by this section is filed in the district court,

the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

"(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

"(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

"(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

"(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

"(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.".

SEC. 107. DEATH PENALTY LITIGATION PROCEDURES.

(a) ADDITION OF CHAPTER TO TITLE 28, UNITED STATES CODE.—Title 28, United States Code, is amended by inserting after chapter 153 the following new chapter:

"CHAPTER 154—SPECIAL HABEAS CORPUS PROCEDURES IN CAPITAL CASES

"Sec. 2261. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment.

"(a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.

"(b) This chapter is applicable if a State establishes by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for

State law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.

"(c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record—

"(1) appointing one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;

"(2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or

"(3) denying the appointment of counsel upon a finding that the prisoner is not indigent.

"(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

"(e) The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254. This limitation shall not preclude the appointment of different counsel, on the court's own motion or at the request of the prisoner, at any phase of State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings.

"Sec. 2262. Mandatory stay of execution; duration; limits on stays of execution; successive petitions.

"(a) Upon the entry in the appropriate State court of record of an order under section 2261(c), a warrant or order setting an execution date for a State prisoner shall be stayed upon application to any court that would have jurisdiction over any proceedings filed under section 2254. The application shall recite that the State has invoked the post-conviction review procedures of this chapter and that the scheduled execution is subject to stay.

"(b) A stay of execution granted pursuant to subsection (a) shall expire if—

"(1) a State prisoner fails to file a habeas corpus application under section 2254 within the time required in section 2263;

"(2) before a court of competent jurisdiction, in the presence of counsel, unless the prisoner has competently and knowingly waived such counsel, and after having been advised of the consequences, a State prisoner under capital sentence waives the right to pursue habeas corpus review under section 2254; or

"(3) a State prisoner files a habeas corpus petition under section 2254 within the time required by section 2263 and fails to make a substantial showing of the denial of a Federal right or is denied relief in the district court or at any subsequent stage of review.

"(c) If one of the conditions in subsection (b) has occurred, no Federal court thereafter shall have the authority to enter a stay of execution in the case, unless the court of appeals approves the filing of a second or successive application under section 2244(b).

"Sec. 2263. Filing of habeas corpus application; time requirements; tolling rules

"(a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.

"(b) The time requirements established by subsection (a) shall be tolled—

"(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;

"(2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; and

"(3) during an additional period not to exceed 30 days, if—

"(A) a motion for an extension of time is filed in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus application under section 2254; and

"(B) a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section.

"Sec. 2264. Scope of Federal review; district court adjudications

"(a) Whenever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is—

"(1) the result of State action in violation of the Constitution or laws of the United States;

"(2) the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable; or

"(3) based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review.

"(b) Following review subject to subsections (a), (d), and (e) of section 2254, the court shall rule on the claims properly before it.

"Sec. 2265. Application to State unitary review procedure

"(a) For purposes of this section, a 'unitary review' procedure means a State procedure that authorizes a person under sentence of death to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack. This chapter shall apply, as provided in this section, in relation to a State unitary review procedure if the State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of com-

petent counsel in the unitary review proceedings, including expenses relating to the litigation of collateral claims in the proceedings. The rule of court or statute must provide standards of competency for the appointment of such counsel.

"(b) To qualify under this section, a unitary review procedure must include an offer of counsel following trial for the purpose of representation on unitary review, and entry of an order, as provided in section 2261(c), concerning appointment of counsel or waiver or denial of appointment of counsel for that purpose. No counsel appointed to represent the prisoner in the unitary review proceedings shall have previously represented the prisoner at trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

"(c) Sections 2262, 2263, 2264, and 2266 shall apply in relation to cases involving a sentence of death from any State having a unitary review procedure that qualifies under this section. References to State 'post-conviction review' and 'direct review' in such sections shall be understood as referring to unitary review under the State procedure. The reference in section 2262(a) to 'an order under section 2261(c)' shall be understood as referring to the post-trial order under subsection (b) concerning representation in the unitary review proceedings, but if a transcript of the trial proceedings is unavailable at the time of the filing of such an order in the appropriate State court, then the start of the 180-day limitation period under section 2263 shall be deferred until a transcript is made available to the prisoner or counsel of the prisoner.

"Sec. 2266. Limitation periods for determining applications and motions

"(a) The adjudication of any application under section 2254 that is subject to this chapter, and the adjudication of any motion under section 2255 by a person under sentence of death, shall be given priority by the district court and by the court of appeals over all noncapital matters.

"(b)(1)(A) A district court shall render a final determination and enter a final judgment on any application for a writ of habeas corpus brought under this chapter in a capital case not later than 180 days after the date on which the application is filed.

"(B) A district court shall afford the parties at least 120 days in which to complete all actions, including the preparation of all pleadings and briefs, and if necessary, a hearing, prior to the submission of the case for decision.

"(C)(i) A district court may delay for not more than one additional 30-day period beyond the period specified in subparagraph (A), the rendering of a determination of an application for a writ of habeas corpus if the court issues a written order making a finding, and stating the reasons for the finding, that the ends of justice that would be served by allowing the delay outweigh the best interests of the public and the applicant in a speedy disposition of the application.

"(ii) The factors, among others, that a court shall consider in determining whether a delay in the disposition of an application is warranted are as follows:

"(I) Whether the failure to allow the delay would be likely to result in a miscarriage of justice.

"(II) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate briefing within the time limitations established by subparagraph (A).

"(III) Whether the failure to allow a delay in a case that, taken as a whole, is not so unusual or so complex as described in subclause (II), but would otherwise deny the applicant reasonable time to obtain counsel, would unreasonably deny the applicant or the government continuity of counsel, or would deny counsel for the applicant or the government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

"(iii) No delay in disposition shall be permissible because of general congestion of the court's calendar.

"(iv) The court shall transmit a copy of any order issued under clause (i) to the Director of the Administrative Office of the United States Courts for inclusion in the report under paragraph (5).

"(2) The time limitations under paragraph (1) shall apply to—

"(A) an initial application for a writ of habeas corpus;

"(B) any second or successive application for a writ of habeas corpus; and

"(C) any redetermination of an application for a writ of habeas corpus following a remand by the court of appeals or the Supreme Court for further proceedings, in which case the limitation period shall run from the date the remand is ordered.

"(3)(A) The time limitations under this section shall not be construed to entitle an applicant to a stay of execution, to which the applicant would otherwise not be entitled, for the purpose of litigating any application or appeal.

"(B) No amendment to an application for a writ of habeas corpus under this chapter shall be permitted after the filing of the answer to the application, except on the grounds specified in section 2244(b).

"(4)(A) The failure of a court to meet or comply with a time limitation under this section shall not be a ground for granting relief from a judgment of conviction or sentence.

"(B) The State may enforce a time limitation under this section by petitioning for a writ of mandamus to the court of appeals. The court of appeals shall act on the petition for a writ of mandamus not later than 30 days after the filing of the petition.

"(5)(A) The Administrative Office of the United States Courts shall submit to Congress an annual report on the compliance by the district courts with the time limitations under this section.

"(B) The report described in subparagraph (A) shall include copies of the orders submitted

by the district courts under paragraph (1)(B)(iv).

"(c)(1)(A) A court of appeals shall hear and render a final determination of any appeal of an order granting or denying, in whole or in part, an application brought under this chapter in a capital case not later than 120 days after the date on which the reply brief is filed, or if no reply brief is filed, not later than 120 days after the date on which the answering brief is filed.

"(B)(i) A court of appeals shall decide whether to grant a petition for rehearing or other request for rehearing en banc not later than 30 days after the date on which the petition for rehearing is filed unless a responsive pleading is required, in which case the court shall decide whether to grant the petition not later than 30 days after the date on which the responsive pleading is filed.

"(ii) If a petition for rehearing or reeharing en banc is granted, the court of appeals shall hear and render a final determination of the appeal not later than 120 days after the date on which the order granting rehearing or rehearing en banc is entered.

"(2) The time limitations under paragraph (1) shall apply to—

"(A) an initial application for a writ of habeas corpus;

"(B) any second or successive application for a writ of habeas corpus; and

"(C) any redetermination of an application for a writ of habeas corpus or related appeal following a remand by the court of appeals en

banc or the Supreme Court for further proceedings, in which case the limitation period shall run from the date the remand is ordered.

"(3) The time limitations under this section shall not be construed to entitle an applicant to a stay of execution, to which the applicant would otherwise not be entitled, for the purpose of litigating any application or appeal.

"(4)(A) The failure of a court to meet or comply with a time limitation under this section shall not be a ground for granting relief from a judgment of conviction or sentence.

"(B) The State may enforce a time limitation under this section by applying for a writ of mandamus to the Supreme Court.

"(5) The Administrative Office of the United States Courts shall submit to Congress an annual report on the compliance by the courts of appeals with the time limitations under this section."

(b) TECHNICAL AMENDMENT.—The part analysis for part IV of title 28, United States Code, is amended by adding after the item relating to chapter 153 the following new item:

"154. Special habeas corpus procedures in capital cases ..... 2261.".

(c) EFFECTIVE DATE.—Chapter 154 of title 28, United States Code (as added by subsection (a)) shall apply to cases pending on or after the date of enactment of this Act.

SEC. 108. TECHNICAL AMENDMENT.

Section 408(q) of the Controlled Substances Act (21 U.S.C. 848(q)) is amended by amending paragraph (9) to read as follows:

"(9) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under paragraph (10). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.".

4. Chapters 153 and 154 of Title 28 of the United States Code, as amended (new material italicized and deleted material bracketed), provide:

UNITED STATES CODE
TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE
PART VI—PARTICULAR PROCEEDINGS
CHAPTER 153—HABEAS CORPUS

Sec.

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective

jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State

which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

§ 2242. Application

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.

§ 2243. Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed. The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts. The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has

been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, and the petition presents no new ground not theretofore presented and determined, [and the judge or court is satisfied that the ends of justice will not be served by such inquiry] *except as provided in section 2255.*

[(b) When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.]

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post- conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

§ 2245. Certificate of trial judge admissible in evidence

On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who presided at the trial resulting in the judgment, setting forth the facts occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place.

§ 2246. Evidence; depositions; affidavits

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound

written interrogatories to the affiants, or to file answering affidavits.

§ 2247. Documentary evidence

On application for a writ of habeas corpus documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence.

§ 2248. Return or answer; conclusiveness

The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true.

§ 2249. Certified copies of indictment, plea and judgment; duty of respondent

On application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of a court of the United States, the respondent shall promptly file with the court certified copies of the indictment, plea of petitioner and the judgment, or such of them as may be material to the questions raised, if the petitioner fails to attach them to his petition, and same shall be attached to the return to the writ, or to the answer to the order to show cause.

§ 2250. Indigent petitioner entitled to documents without cost

If on any application for a writ of habeas corpus an order has been made permitting the petitioner to

prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending.

§ 2251. Stay of State court proceedings

A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or approval were pending.

§ 2252. Notice

Prior to the hearing of a habeas corpus proceeding in behalf of a person in custody of State officers or by virtue of State laws notice shall be served on the attorney general or other appropriate officer of such State as the justice or judge at the time of issuing the writ shall direct.

§ 2253. Appeal

[In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to re-

view, on appeal, by the court of appeals for the circuit where the proceeding is had.

There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.]

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

[(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.]

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

[(d)] (*e*) [In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment

of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the

record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in pargraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.]

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

[(e)] *(f)* If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

[(f)] *(g)* A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an ap-

plicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

§ 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

[A motion for such relief may be made at any time.]

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional

rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

[The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.]

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

CHAPTER 154—SPECIAL HABEAS CORPUS PROCEDURES IN CAPITAL CASES

Sec.

§ 2261. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment

(a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.

(b) This chapter is applicable if a State establishes by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for the appointment, compensation, and payment of

reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.

(c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record—

(1) appointing one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;

(2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or

(3) denying the appointment of counsel upon a finding that the prisoner is not indigent.

(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(e) The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in

a proceeding arising under section 2254. This limitation shall not preclude the appointment of different counsel, on the court's own motion or at the request of the prisoner, at any phase of State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings.

§ 2262. Mandatory stay of execution; duration; limits on stays of execution; successive petitions

(a) Upon the entry in the appropriate State court of record of an order under section 2261(c), a warrant or order setting an execution date for a State prisoner shall be stayed upon application to any court that would have jurisdiction over any proceedings filed under section 2254. The application shall recite that the State has invoked the post-conviction review procedures of this chapter and that the scheduled execution is subject to stay.

(b) A stay of execution granted pursuant to subsection (a) shall expire if—

(1) a State prisoner fails to file a habeas corpus application under section 2254 within the time required in section 2263;

(2) before a court of competent jurisdiction, in the presence of counsel, unless the prisoner has competently and knowingly waived such counsel, and after having been advised of the consequences, a State prisoner under capital sentence waives the right to pursue habeas corpus review under section 2254; or

(3) a State prisoner files a habeas corpus petition under section 2254 within the time required by section 2263 and fails to make a substantial showing of the denial of a Federal right

or is denied relief in the district court or at any subsequent stage of review.

(c) If one of the conditions in subsection (b) has occurred, no Federal court thereafter shall have the authority to enter a stay of execution in the case, unless the court of appeals approves the filing of a second or successive application under section 2244(b).

§ 2263. Filing of habeas corpus application; time requirements; tolling rules

(a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.

(b) The time requirements established by subsection (a) shall be tolled—

(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;

(2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; and

(3) during an additional period not to exceed 30 days, if—

(A) a motion for an extension of time is filed in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus application under section 2254; and

(B) a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section.

§ 2264. Scope of Federal review; district court adjudications

(a) Whenever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is—

(1) the result of State action in violation of the Constitution or laws of the United States;

(2) the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable; or

(3) based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review.

(b) Following review subject to subsections (a), (d) & (e) of section 2254, the court shall rule on the claims properly before it.

§ 2265. Application to State unitary review procedure

(a) For purposes of this section, a 'unitary review' procedure means a State procedure that authorizes a person under sentence of death to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack. This chapter shall apply, as provided in this section, in relation to a State unitary review procedure if the State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in the unitary review proceedings, including expenses relating to the litigation of collateral claims in the proceedings. The rule of court or statute must provide standards of competency for the appointment of such counsel.

(b) To qualify under this section, a unitary review procedure must include an offer of counsel following trial for the purpose of representation on unitary review, and entry of an order, as provided in section 2261(c), concerning appointment of counsel or waiver or denial of appointment of counsel for that purpose. No counsel appointed to represent the prisoner in the unitary review proceedings shall have previously represented the prisoner at trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(c) Sections 2262, 2263, 2264, and 2266 shall apply in relation to cases involving a sentence of death from any State having a unitary review procedure that qualifies under this section. References to State 'post-conviction review' and 'direct review' in such sections

shall be understood as referring to unitary review under the State procedure. The reference in section 2262(a) to 'an order under section 2261(c)' shall be understood as referring to the post-trial order under subsection (b) concerning representation in the unitary review proceedings, but if a transcript of the trial proceedings is unavailable at the time of the filing of such an order in the appropriate State court, then the start of the 180-day limitation period under section 2263 shall be deferred until a transcript is made available to the prisoner or counsel of the prisoner.

§ 2266. Limitation periods for determining applications and motions

(a) The adjudication of any application under section 2254 that is subject to this chapter, and the adjudication of any motion under section 2255 by a person under sentence of death, shall be given priority by the district court and by the court of appeals over all noncapital matters.

(b)(1)(A) A district court shall render a final determination and enter a final judgment on any application for a writ of habeas corpus brought under this chapter in a capital case not later than 180 days after the date on which the application is filed.

(B) A district court shall afford the parties at least 120 days in which to complete all actions, including the preparation of all pleadings and briefs, and if necessary, a hearing, prior to the submission of the case for decision.

(C)(i) A district court may delay for not more than one additional 30-day period beyond

the period specified in subparagraph (A), the rendering of a determination of an application for a writ of habeas corpus if the court issues a written order making a finding, and stating the reasons for the finding, that the ends of justice that would be served by allowing the delay outweigh the best interests of the public and the applicant in a speedy disposition of the application.

(ii) The factors, among others, that a court shall consider in determining whether a delay in the disposition of an application is warranted are as follows:

(I) Whether the failure to allow the delay would be likely to result in a miscarriage of justice.

(II) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate briefing within the time limitations established by subparagraph (A).

(III) Whether the failure to allow a delay in a case that, taken as a whole, is not so unusual or so complex as described in subclause (II), but would otherwise deny the applicant reasonable time to obtain counsel, would unreasonably deny the applicant or the government continuity of counsel, or would deny counsel for the applicant or the government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(iii) No delay in disposition shall be permissible because of general congestion of the court's calendar.

(iv) The court shall transmit a copy of any order issued under clause (i) to the Director of the Administrative Office of the United States Courts for inclusion in the report under paragraph (5).

(2) The time limitations under paragraph (1) shall apply to—

(A) an initial application for a writ of habeas corpus;

(B) any second or successive application for a writ of habeas corpus; and

(C) any redetermination of an application for a writ of habeas corpus following a remand by the court of appeals or the Supreme Court for further proceedings, in which case the limitation period shall run from the date the remand is ordered.

(3)(A) The time imitations under this section shall not be construed to entitle an applicant to a stay of execution, to which the application would otherwise not be entitled, for the purpose of litigating any application or appeal.

(B) No amendment to an application for a writ of habeas corpus under this chapter shall be permitted after the filing of the answer to the application, except on the grounds specified in section 2244(b).

(4)(A) The failure of a court to meet or comply with a time limitation under this section

shall not be a ground for granting relief from a judgment of conviction or sentence.

(B) The State may enforce a time limitation under this section by petitioning for a writ of mandamus to the court of appeals. The court of appeals shall act on the petition for a writ of mandamus not later than 30 days after the filing of the petition.

(5)(A) The Administrative Office of the United States Courts shall submit to Congress an annual report on the compliance by the district courts with the time limitations under this section.

(B) The report described in subparagraph (A) shall include copies of the orders submitted by the district courts under paragraph(1)(B)(iv).

(c)(1)(A) A court of appeals shall hear and render a final determination of any appeal of an order granting or denying, in whole or in part, an application brought under this chapter in a capital case not later than 120 days after the date on which the reply brief is filed, or if no reply brief is filed, not later than 120 days after the date on which the answering brief is filed.

(B)(i) A court of appeals shall decide whether to grant a petition for rehearing or other request for rehearing en banc not later than 30 days after the date on which the petition for rehearing is filed unless a responsive pleading is required, in which case the court shall decide whether to grant the petition not later otherwise not be entitled, for the purpose of litithan 30 days after the date on which the responsive pleading is filed.

(ii) If a petition for rehearing or rehearing en banc is granted, the court of appeals shall hear and render a final determination of the appeal not later than 120 days after the date on which the order granting rehearing or rehearing en banc is entered.

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Supreme Court, U.S.

FILED

MAY 17 1996

CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ELLIS WAYNE FELKER,

Petitioner,

—v.—

TONY TURPIN, WARDEN,

Respondent.

ON WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
AND PETITION FOR WRIT OF HABEAS CORPUS

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF GEORGIA IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of individual liberty embodied in our Constitution. The ACLU of Georgia is one of its statewide affiliates, and has a particular interest in the resolution of this case because it arises in the state of Georgia.

Since the first Judiciary Act of 1789,[2] the writ of habeas corpus has been an essential part of the constitutional landscape and a critical means for the vindication of constitutional rights in federal court. Petitioner's inability to get his habeas petition even heard in the lower courts demonstrates the extent to which Congress has both curtailed the Great Writ and slammed the doors of the federal courthouse in the face of a disfavored class of litigants.

To the extent that Congress has also sought to achieve its goal of expediting executions by stripping this Court of its appellate jurisdiction, Congress has brought to the fore a series of profound constitutional questions that have been frequently discussed but never decided in 200 years, and that threaten to alter the fundamental nature of our constitutional government.

The issue of whether Congress may limit the appellate jurisdiction of this Court and, if so, whether that power is subject to any independent constitutional constraints is a matter of significant institutional importance to the ACLU, which regularly appears in cases before this Court involving a broad array of constitutional disputes. Today, the narrow

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

[2] Act of Sept. 24, 1789, ch.20, 1 Stat. 73, *codified at* 28 U.S.C. §2241.

question that must be addressed is whether Congress can make the federal courts of appeal the final arbiters of the appropriateness of successive habeas petitions filed by state prisoners. But that power, once recognized, will be difficult to cabin, and tomorrow we will inevitably be facing even bolder efforts by future legislative majorities to limit this Court's appellate jurisdiction over other constitutional claims.

This brief therefore focuses on the first question identified by the Court when it accepted this case for review. 64 U.S.L.W. 3740 (May 3, 1996). We wish to make clear, however, that our decision to focus on the complex jurisdictional relationship between Congress and this Court -- and, in particular, the meaning of the Exceptions Clause under Article III[3] -- is primarily a function of the expedited briefing schedule set by the Court. As discussed below, we believe the constitutional stakes can and should be substantially reduced by construing the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub.L.No. 104-518, to foreclose only one avenue of this Court's appellate jurisdiction over successive habeas petitions rather than all avenues. Further, we believe that a construction of the Act foreclosing *any* review by this Court of successive habeas petitions that fail to survive prescreening by the court of appeals cannot be reconciled with this Court's constitutionally assigned role under Article III as the final arbiter of what the Constitution means. Because of the expedited briefing schedule and the basis for the decision below, this brief does not address any issues arising under the Constitution's Suspension Clause.[4]

[3] "In all Cases affecting Ambassadors, other Public Ministers and consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. Const., Art. III, §2, cl.2.

STATEMENT OF THE CASE

The Anti-Terrorism and Effective Death Penalty Act of 1996 was signed into law on April 24, 1996. This case concerns one section of that Act, which governs the circumstances under which federal courts can hear and decide "second or successive" habeas corpus petitions filed by state prisoners under 28 U.S.C. §2254.[5]

Even prior to passage of the Act, a state prisoner filing a successive petition in federal court faced substantial obstacles under this Court's decisions. *See, e.g., McCleskey v. Zant*, 499 U.S. 467 (1991). Nevertheless, Congress remained concerned with what it perceived as "the problem of delay and repetitive litigation in capital cases." H.Rep.No. 104-23, 104th Cong. 1st Sess. 9 (1995). It addressed this "problem" in §106(b)(3) of the Act, which sets forth a unique set of substantive and procedural rules that apply only to successive habeas petitions. First, §106(b)(3)(A) provides that a successive habeas petition may not even be filed in the district court unless the petitioner obtains advance authorization from a panel of the court of appeals. Second, §106(b)(3)(C) provides that the court of appeals panel may not grant authorization unless it finds that the applicant has made out a *prima facie* case that the constitution-

[4] "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it." U.S. Const., Art. I, §9, cl.2.

[5] For simplicity's sake, this brief will refer to successive petitions rather than the redundant reference to "second or successive" petition used in the Act itself.

al claim asserted in the successive petition: (1) rests on a new rule of constitutional law "that was previously unavailable," or (2) on factual allegations that "could not have been discovered previously through the exercise of due diligence" and that, if proven, would establish a basis for petitioner's acquittal by clear and convincing evidence. Finally, and most relevant here, §106(b)(3)(E) provides that a state prisoner whose application to file a successive habeas petition has been denied by a three-judge panel of the court of appeals may not seek rehearing from the court of appeals itself nor seek review by this Court through a writ of *certiorari*.

Petitioner Ellis Wayne Felker, who is facing a sentence of death, attempted to file a second habeas petition on May 1, 1996, one week after the new Act went into effect. In compliance with the provisions of the new Act, he sought permission from the Eleventh Circuit prior to filing in the district court. His request for permission was denied by the court of appeals on May 2, 1996.[6] The question now presented for review is whether that gatekeeping function assigned to the court of appeals by the new Act is entirely unreviewable by this Court, initially as a matter of statutory construction and ultimately as a matter of constitutional law.

SUMMARY OF ARGUMENT

Amici respectfully submit that this is neither the case nor the time for the Court to resolve the meaning of the Exceptions Clause in Article III, a question of enormous constitutional moment that has been left undecided for 200 years. To be sure, the Court has discussed the meaning of the Exceptions Clause on various occasions over the past two centuries. But the most that can be said about the prior discussions is that they have framed the terms of the debate. The Court has wisely refrained from finally settling the question of congressional authority over the Court's appellate jurisdiction because Congress has wisely refrained from forcing the question by always leaving open at least some avenue for this Court to exercise appellate review of substantial constitutional claims.

In this case, Congress has undeniably closed off one avenue of review: *certiorari* jurisdiction is no longer available under 28 U.S.C. §1254 when a state prisoner's request to file a successive habeas petition under 28 U.S.C. §2254 is denied by a three-judge panel of the court of appeals. However, nothing in the language of the new Act even purports to limit this Court's jurisdiction over habeas actions under 28 U.S.C. §2241. This was precisely the situation in *Ex Parte McCardle*, 74 U.S. 506 (1869), and it was key to the Court's willingness to uphold a congressional statute depriving the Court of jurisdiction to hear appeals from the federal circuit courts. Given this widely circulated view of *McCardle* and the prominent role it has played in the constitutional debate over the Exceptions Clause, there is no reason to believe that the omission by Congress of any mention of §2241 in the new Act was inadvertent.

At the very least, the 1996 Act is susceptible to an interpretation that would leave this Court's jurisdiction under §2241 intact. Even if the Act could be described as ambiguous in this regard, traditional rules of statutory construction favor an interpretation of the Act that avoids difficult constitutional questions. *NLRB v. Catholic Bishop*, 440 U.S. 490, 507 (1979). This Court, moreover, has routinely insisted on a clear statement from Congress before it intrudes on the constitutional prerogatives of the states under the Eleventh Amendment. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242-43 (1985). It is even more appropriate to insist upon a clear statement from Congress before it overrides

[6] *Felker v. Turpin*, No. 96-1077 (11th Cir. May 2, 1996).

the constitutionally assigned role of a co-equal branch of the federal government, especially in circumstances where the power of Congress to act in this fashion is anything but clear.

There is yet another reason for the Court to hesitate before plunging into a full-scale exploration of the meaning of the Exceptions Clause in this case, at this time. Whatever else may be said about the relationship between Congress and the Court under Article III, it presents constitutional issues of daunting difficulty. The academic commentary in this area is extensive, it has been written by many of our nation's leading constitutional scholars, it is conflicting, and it is complex. If the Court feels compelled to go beyond the question of statutory construction and reach the underlying constitutional questions, *amici* respectfully submit that the Court should order reargument in the fall and give each side a chance to submit additional briefs.

Should the Court reach the Exceptions Clause issue in this case, *amici* urge the Court to reject a view of the Exceptions Clause that grants Congress plenary authority over the Court's appellate jurisdiction. Such an expansive view of the Exceptions Clause cannot be reconciled with the text of the Constitution, its history or its structure. Nor can it be reconciled with our deeply embedded view of the role of the Supreme Court in our constitutional scheme of checks and balances. *Marbury v. Madison*, 5 U.S. 137 (1803). If forced to choose, the Court should embrace the position first articulated by Professor Hart forty-five years ago in his famous dialogue on federal jurisdiction: any exceptions to the Supreme Court's appellate jurisdiction enacted by Congress "must not be such as will destroy the essential role of the Supreme Court in the constitutional plan." Henry M. Hart, Jr., "The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic," 66 Harv.L.Rev. 1362, 1365 (1953).

The provisions of the 1996 Act at issue in this case cannot be sustained under this standard. The issue is not whether successive habeas petitions are a part of this Court's "essential role" in some abstract sense. Rather, the issue is whether the small core of successive habeas petitions still permitted under the 1996 Act implicate this Court's "essential role . . . in the constitutional plan." If this Court is deprived of jurisdiction to decide whether a state prisoner's constitutional claim is entitled to a second look because of new law or new facts, then the Court is effectively denied the jurisdiction it needs to assure the supremacy of federal law and a uniform interpretation of the federal Constitution. There is little doubt, however, that the Court's role in assuring a uniform and supreme interpretation of the federal Constitution was central to the compromise that produced Article III at the Constitutional Convention.

ARGUMENT

I. THIS CASE, AT THIS TIME, IS NOT AN APPROPRIATE VEHICLE FOR THE COURT TO DECIDE WHETHER AND TO WHAT EXTENT CONGRESS MAY LIMIT THE COURT'S APPELLATE JURISDICTION UNDER ARTICLE III

The decision, in Article III, to vest the judicial power of the newly formed union in "one supreme Court and in such inferior Courts as the congress may from time to time ordain and establish," was one of the great political compromises of the Constitutional Convention. Adopted after great debate, it assured the supremacy of federal law by guaranteeing that state courts would not have final say over the meaning of the federal Constitution. At the same time, it reassured the states that their traditional prerogatives would not be usurped by a constitutionally ordained system of lower federal courts with general jurisdiction. *See generally*

Lawrence Sager, "Foreward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts," 95 Harv.L.Rev. 17, 46-49 (1981). By contrast, the Exceptions Clause was adopted by the Convention "without a ripple of recorded debate, concern, or explication." *Id.* at 51 (footnote omitted).

The extent to which this almost casually adopted, last minute addition to Article III was meant to leave the role of the Supreme Court as the ultimate arbiter of the Constitution at the whim of the national legislature has been hotly debated by constitutional scholars for many years. Yet despite this debate, and despite opportunities to do so, this Court has never definitively resolved the meaning and scope of the Exceptions Clause. Whether that hesitancy reflects the Court's general reluctance to decide constitutional questions unless absolutely necessary, *see Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (1936)(Brandeis, J., concurring), or a more specific view that the very ambiguity of the Exceptions Clause creates a healthy tension between the legislative and judicial branches that itself promotes the constitutional goal of checks and balances, the history of this endeavor reinforces the appropriateness of caution.

Here, there are at least two powerful reasons to proceed slowly. First, §106(b)(3)(E) of the 1996 Act does not, in fact, foreclose all Supreme Court review of the successive habeas petition in this case. Second, the Article III questions lurking in the background of this case are both exceedingly complex and exceedingly consequential. As this Court has recognized for 200 years, there are very good reasons to avoid prematurely opening this constitutional Pandora's box.

A. The 1996 Act Does Not Foreclose Supreme Court Review Under 28 U.S.C. §2241

This issue of statutory construction has been fully addressed in petitioner's brief. Rather than repeat that discussion, we will limit ourselves to a few salient points.

As this Court has frequently emphasized, the interpretation of any statute must begin with the language of the statute itself. *See, e.g., Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991)("When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances"). In this case, nothing in the language of the 1996 Act even purports to limit this Court's habeas jurisdiction under 28 U.S.C. §2241.[7] Indeed, 28 U.S.C. §2241 is not even mentioned in §106 of the 1996 Act. This omission is particularly telling in light of the statute's explicit reference to "successive habeas corpus application[s] under section 2254." §106(b)(1)(2). Under familiar rules of statutory construction, the purposeful inclusion of a reference to §2254 in the provision limiting this Court's appellate jurisdiction implies the equally purposeful exclusion of any reference to §2241 in the same provision. *Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163, 168 (1993).

Any effort to read §2241 into the embrace of the 1996 Act and its limit on this Court's appellate jurisdiction also runs afoul of the principle that repeals by implication are disfavored. *E.g., Morton v. Manari*, 417 U.S. 535, 549 (1974). This principle is as applicable in the jurisdictional context as in any other. Perhaps even more so. On the one hand, it has long been held that the affirmative decision by Congress to confer jurisdiction on the federal courts, including this Court, implies the "negation" of any jurisdiction not affirmatively granted. *Ex Parte McCardle*, 74 U.S. at 513, citing *Durousseau v. United States*, 10 U.S. 307 (1818). On

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[7] 28 U.S.C. §2241(a) provides, in pertinent part: "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions."

the other hand, the repeal or limitation of a specific jurisdictional grant does not implicitly repeal or limit other jurisdictional statutes that are not mentioned.

Most notably, this was exactly the situation that confronted the Court in *Ex Parte McCardle*, 74 U.S. 506. McCardle was arrested by the U.S. Army and charged with violating the Military Reconstruction Act of 1867 for publishing inflammatory editorials as editor of the Vicksburg Times . Contending that the Act was unconstitutional, McCardle filed a habeas petition in federal court. When the writ was denied, he appealed to the Supreme Court. While his appeal was pending, Congress repealed the statute that granted this Court jurisdiction over appeals in habeas cases. Although this Court upheld the repeal under the Exceptions Clause, a matter that will be dealt with at greater length later, it carefully concluded its opinion with the following, much-quoted observation:

> Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the Court, in cases of habeas corpus, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.

74 U.S. at 515.[8]

One year later in *Ex Parte Yerger*, 75 U.S. 86 (1869), the Court explicitly relied on the "previous" habeas jurisdiction it had alluded to in *McCardle*. "We could come to no other conclusion," Chief Justice Chase wrote, "without holding that the whole appellate jurisdiction of this Court, in cases of habeas corpus, conferred by the Constitution, recognized by law, and exercised from the foundation of the government hitherto, has been taken away, without the expression of such intent, and by mere implication . . . ." 75 U.S. at 106.

By holding here, as it did in *McCardle* and *Yerger*, that §2241 is unaffected by the limitations that Congress imposed on §2254 appeals in the 1996 Act, the Court will be acting in accord with yet another rule of statutory construction. Out of deference to Congress, this Court has consistently held that federal statutes should be construed to avoid constitutional difficulties, whenever possible. *E.g.*, *NLRB v. Catholic Bishop*, 440 U.S. at 507; *Johnson v. Robison*, 415 U.S. 361, 366-67 (1974). Whatever the final resolution of the question may be, it is undeniable that construing the 1996 Act to withdraw this Court's appellate jurisdiction in its entirety whenever a successive habeas petition is not precleared by the circuit courts would raise profound constitutional questions. These constitutional difficulties can be avoided if the 1996 Act is plausibly construed to leave intact this Court's longstanding habeas jurisdiction under §2241.

Lastly, deference between co-equal branches of the federal government is and must be a two-way street. This Court has repeatedly required a clear statement from Congress before it would abrogate a state's Eleventh Amendment immunity. *E.g.*, *Atascadero State Hospital v. Scanlon*, 473 U.S. at 242-43. It is no less appropriate to require a clear statement from Congress before concluding that the legislature intended to abrogate the Court's historic role as a final arbiter of constitutional claims in habeas cases. Needless to say, Congress in this case has made no statement at

[8] The Court's reference in *McCardle* to "jurisdiction which was previously exercised" refers to the predecessor to 28 U.S.C. §2241. Thus, *McCardle* is precisely analogous to the situation here.

all regarding §2241, let alone one with the requisite clarity even to contemplate disturbing the delicate constitutional balance that has prevailed for 200 years.

B. If Reached, The Fundamental Constitutional Issues Presented By This Case Deserve Careful And Deliberate Review

In the prescient words of Professor Gunther, "the complexity of these problems is directly proportional to the length of time one dwells on them." Gerald Gunther, "Congressional Power to Curtail Federal Jurisdiction: An Opinionated Guide to the Ongoing Debate," 36 Stan.L.Rev. 895, 898 (1984). This Court, of course, is not bound by the academic debate that has swirled around the Exceptions Clause for several decades. Nevertheless, the absence of any consensus within the academic community on such a fundamental question of constitutional jurisprudence certainly suggests the need for careful deliberation.

The academic commentary, which is voluminous, can be divided into several camps. The view that commands perhaps the broadest consensus is most prominently associated with Professor Hart. Hart's view, since adopted (with various nuances) by many others, holds that the Exceptions Clause does not permit Congress to intrude upon the essential functions of the Supreme Court in the constitutional plan. *See, e.g.*, Hart, *supra*; Sager, *supra*; Leonard G. Ratner, "Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction," 27 Vill.L. Rev. 929 (1982); Ratner, "Congressional Power over the Appellate Jurisdiction of the Supreme Court," 109 U.Pa.L. Rev. 157 (1960)(hereinafter "Congressional Power").

The proposition that congressional power under the Exceptions Clause is subject to some constitutional limits is broadly accepted within the academic literature. However, a second group of commentators takes the position that those limits must be located in the Bill of Rights rather than in Article III itself. *See, e.g.*, Gunther, *supra* (and articles cited therein).

Those two principal positions are then supplemented by several others. For example, a third view holds that the Exceptions Clause only authorizes Congress to limit the manner in which the Court may review questions of fact, but does not limit the Court's appellate jurisdiction to review questions of law. *See* Henry J. Merry, "Scope of the Supreme Court's Appellate Jurisdiction: Historical Bases," 47 Minn.L.Rev. 53 (1962). Still a fourth view holds that the Exceptions Clause grants Congress no power to limit the Supreme Court's appellate jurisdiction in federal question cases but plenary authority to limit the Court's appellate jurisdiction in certain other "controversies." *See* Akhil Reed Amar, "A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction," 65 B.U.L.Rev. 205 (1985).

The purpose of this summary and incomplete review is not to take sides although, as previously noted, *amici* believe that the "essential function" view expressed by Professor Hart and others comes closest to the true meaning of the Exceptions Clause. It is simply to illuminate the breadth of the literature and the depth of the problem. Should this Court find it necessary to reach those "substantial questions" on the facts of this case, we respectfully suggest that the cases be recalendared for the fall and that the parties and *amici* be given an additional opportunity to brief the constitutional questions identified by this Court in its order of May 3, 1996.

II. THIS COURT SHOULD REJECT ANY INTERPRETATION OF THE EXCEPTIONS CLAUSE THAT PERMITS CONGRESS, IN ITS SOLE DISCRETION, TO LIMIT THIS COURT'S APPELLATE JURISDICTION TO HEAR CONSTITUTIONAL CLAIMS

If the Court reaches the merits of the Article III controversy, the constitutional stakes rise enormously. The question of whether, and to what extent, Congress can limit this Court's appellate jurisdiction by invoking the Exceptions Clause has implications that extend far beyond the narrow context of successive habeas petitions. In the early 1980s, literally scores of bills were introduced in Congress to strip this Court (and often the lower federal courts, as well) of jurisdiction to hear cases involving school prayer, school busing, and abortion. *See* Sager, *supra*, at 18 n.3. Fifteen years ago Congress wisely stepped back from the precipice by defeating each of these assaults on the Court's jurisdiction. But given the current political climate, there is every reason to believe that these or similar bills would be resurrected were this Court to adopt a view of the Exceptions Clause that left Congress free to impose whatever limitations it chose on this Court's appellate jurisdiction.

What may be conceivable in theory would be devastating in practice to the real world system of checks and balances that has enabled our constitutional system to function for 200 years. In the end, therefore, few scholars quarrel with the notion that the Exceptions Clause must be subject to some constitutional constraints. The existence of a national union presupposes the supremacy of federal law; the supremacy of federal law presupposes the existence of an institution capable of defining and enforcing federal law; since *Marbury v. Madison*, 5 U.S. at 177, "[i]t is emphatically the province and duty of the judicial department to say what the law is"; and that duty cannot be performed with consistency and courage if Congress is free to strip the Court of its appellate jurisdiction whenever Congress sees fit.

The argument that Congress has plenary power under the Exceptions Clause is thus at odds with the most fundamental premises of our constitutional government. Not surprisingly, it is also inconsistent with the language, history, and structure of the Constitution itself.

A. The Language, History, And Structure Of Article III Do Not Support An Expansive Reading Of The Exceptions Clause

On its face, Article III plainly does not grant Congress power to withdraw this Court's appellate jurisdiction in its entirety. It merely grants Congress power to make "exceptions" to the appellate jurisdiction conferred on this Court by Article III itself. As commonly understood, the term "exceptions" assumes the existence of a larger whole from which the exceptions are drawn.[9] Because there is no reason to believe that the framers used the term "exceptions" in anything other than its ordinary sense, the most logical reading of the Exceptions Clause is that it permits Congress to withdraw some, but not all, of the Court's appellate jurisdiction. *See* Hart, *supra*, at 1364. Of course, this still leaves open the question of what jurisdiction can be withdrawn under the Exceptions Clause and what cannot. But the recognition that there are some limits to what Congress can do under the Exceptions Clause is sufficient to defeat the claim that the Exceptions Clause confers plenary authority on Congress to do whatever it deems fit.

This interpretation of the term "exceptions" as "im-

[9] *See* Ratner, "Congressional Power," *supra*, at 168 (surveying contemporary dictionary definitions of the word "exception").

pl[ying] some residuum of jurisdiction" that Congress cannot take away, Hart, *supra*, at 1364, is also consistent with the legislative history of the Exceptions Clause as reflected in the records of the Constitutional Convention. *See generally* Ratner, "Congressional Power," *supra*, at 172-73. The initial version of the Exceptions Clause first appeared in a draft prepared by the Committee on Detail.[10] After defining the original jurisdiction of the Supreme Court, the draft stated: "In all the other cases before mentioned, it shall be appellate, with such exceptions and under such regulations as the legislature shall make." 2 Farrand, RECORDS OF THE CONSTITUTIONAL CONVENTION 186 (1911). During the debate that followed in the Convention, this version was amended by adding the phrase "both as to law and to fact" after the word "appellate." *Id.* at 424, 431. At that point, the Exceptions Clause was essentially in its present form. A motion was then made to substitute an entirely different version of the Exceptions Clause, which read: "In all other cases before mentioned the judicial power shall be exercised in such manner as the legislature shall direct." *Id.* at 425, 431. This substitute was defeated by a vote of six delegations to two. *Id.* Had it been adopted, the argument in favor of plenary congressional control over the Court's appellate jurisdiction would have been much stronger. Its defeat sends precisely the opposite message. *See* Ratner, "Congressional Power," *supra*, at 173.

The argument in favor of plenary congressional authority is also inconsistent with the basic political compromise that produced Article III and gave it shape. The notion that the Constitution should provide for a Supreme Court was relatively uncontroversial at the Convention. *See* Sager, *supra*, at 33. The debate over the creation of the lower federal courts, by contrast, was quite rancorous. *Id.* at 34. Ultimately, Madison persuaded the Convention that the solution to the dilemma was to authorize Congress to create inferior federal courts as it deemed necessary. *Id.* at 47. Thus, both the existence and jurisdiction of the lower federal courts was committed to legislative discretion. To interpret the Exceptions Clause as committing the jurisdiction of the Supreme Court to legislative discretion, as well, would have created a parity in constitutional status between the Supreme Court and the lower federal courts that the framers clearly did not contemplate or intend.

B. The "Essential Functions" Test Effectively Reconciles The Structure Of Article III And The Meaning Of The Exceptions Clause

If the Exceptions Clause does not grant Congress plenary authority to control the Supreme Court's appellate jurisdiction, the task becomes to define what it may and may not do. In our view, the boundary proposed by Professor Hart forty-five years ago is an appropriate starting point. At a minimum, "the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan." Hart, *supra*, at 1365. The Reagan Administration took the same view in 1982 when asked to comment on a legislative proposal by Senator Helms to withdraw the Court's appellate jurisdiction in cases involving "voluntary" prayer. In a letter to Senator Thurmond, as Chairman of the Senate Judiciary Committee, Attorney General William French Smith argued that Congress could not constitutionally "'make exceptions' to Supreme Court jurisdiction which would intrude upon the core function of the Supreme Court as an independent and equal branch in our system of separation of powers." Echoing Professor Hart, the Attorney General concluded: "Congress can limit the Supreme Court's appellate jurisdiction only up to the point where it impairs

[10] The Committee on Detail kept no record of its own proceedings.

the Court's core functions in the constitutional scheme."[11]

There is, of course, a certain indeterminacy in the references to "essential" or "core" functions. But like other great constitutional concepts, its meaning must be derived from history and context. The consensus that developed at the Convention to create a Supreme Court was primarily tied to two related notions: the need to assure the supremacy of federal law and the need to assure a uniform interpretation of federal law. Both notions were captured by Madison in THE FEDERALIST PAPERS, No.80. With regard to supremacy, he wrote:

> What, for instance, would avail restrictions on the authority of the State legislature, without some constitutional mode of enforcing the observance of them? . . . This power must either be a direct negative on the state laws, or an authority in the federal courts to overrule such as might be in manifest contravention of the articles of the Union . . . . The latter appears to have been thought by the convention preferable to the latter . . . .

With regard to uniformity, Madison observed, "Thirteen independent courts of final jurisdiction over the same causes, arising out of the same laws, is a hydra in government, from which nothing but contradiction and confusions can proceed." THE FEDERALIST PAPERS, No.80, at 500 (B. Wright ed. 1961).[12]

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[11] These excerpts from the Smith letter appear in Gunther, *supra*, at 902-03.

[12] The fact that the 1996 Act contemplates prescreening by the federal circuits does not safeguard the interest in either supremacy or uniformity when authorization to file a successive habeas petition is denied, as it was in this case.

Few scholars, if any, disagree with the proposition that maintaining the supremacy and uniformity of federal constitutional law is an essential function, indeed *the* essential function, of the Supreme Court. Instead, those scholars who take issue with Hart's interpretation of the Exceptions Clause argue that Hart's view, whatever its persuasiveness, is foreclosed by this Court's decision in *Ex Parte McCardle*, 74 U.S. 506. As described above, however, *McCardle* simply did not involve a total withdrawal of this Court's appellate jurisdiction in habeas cases, a point made emphatically clear by this Court's concluding remarks, *id.* at 515, and then reinforced by its decision the following year in *Ex Parte Yerger*, 75 U.S. 85. Fairly read, therefore, *McCardle* points the way around a constitutional clash over the meaning of the Exceptions Clause. If that prudential detour is rejected, nothing in *McCardle* gives the answer to how the Exceptions Clause should now be construed.

C. The 1996 Act Intrudes Upon The Essential Functions Of The Court

The 1996 Act contains both substantive and procedural limits on successive habeas corpus petitions. By sharply curtailing the circumstances under which a successive habeas petition can be granted, however, the Act paradoxically underscores the necessity and propriety of Supreme Court review. Put into colloquial terms, the Act provides that a successive petition can only be granted when the prisoner's constitutional claim rests on new law or new facts that convincingly undermine the constitutional legitimacy of a state conviction. To allow a conviction to stand under these circumstances without even the possibility of Supreme Court review would threaten both the supremacy and uniformity interests that Article III is designed to promote.

In a system based upon the supremacy of the federal Constitution, that result demeans both law and justice. If

nothing else, the "essential" functions of this Court surely encompass the responsibility to correct a state court's disregard of federal constitutional principle when a person's life is at stake.

CONCLUSION

For the reasons stated herein, this Court should rule that the Anti-Terrorism and Effective Death Penalty Act of 1996 does not foreclose all appellate review of the habeas petition in this case and that, insofar as it does, §106(b)(3)(E) of the Act is unconstitutional.

Respectfully submitted,

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Dated: May 17, 1996

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ELLIS WAYNE FELKER,

Petitioner,

vs.

TONY TURPIN, Warden,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit and Petition for Writ of Habeas Corpus

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BRIEF *AMICI CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION AND CITIZENS FOR LAW AND ORDER IN SUPPORT OF RESPONDENT

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39 pp

QUESTIONS PRESENTED

(1) Whether Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996 (the Act), and in particular Section 106(b)(3)(E), 28 U. S. C. § 2244(b)(3)(E), is an unconstitutional restriction of the jurisdiction of this Court.

(2) Whether and to what extent the provisions of Title I of the Act apply to petitions for habeas corpus filed as original matters in this Court pursuant to 28 U. S. C. § 2241.

(3) Whether application of the Act in this case is a suspension of the writ of habeas corpus in violation of Art. I, § 9, clause 2 of the Constitution.

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BRIEF *AMICI CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION AND CITIZENS FOR LAW AND ORDER IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The Citizens for Law and Order (CLO) is a nonprofit corporation dedicated to encouraging law-abiding citizens to actively involve themselves in the support of law enforcement agencies and other organs of justice through educational, informational, and civic programs. CLO is committed to the principle that all citizens have a basic right to live in physical

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1. Both parties have given written consent to the filing of this brief.

safety and that victims of crime should be restored to a central position within the criminal justice system.

The present case involves an attempt to relitigate yet again a case which has already been reviewed in state and federal courts for 12 years *after* affirmance on appeal. Such extended relitigation is contrary to the interests CJLF and CLO were formed to advance.

SUMMARY OF FACTS AND CASE

Evelyn Ludlum was murdered over 14 years ago. Ellis Felker was convicted of that murder and sentenced to death over 13 years ago. Pet. for Cert. 2. The conviction and sentence have since been reviewed on appeal, two state habeas petitions, and a federal habeas petition.

On May 2, 1996, the U. S. Court of Appeals for the Eleventh Circuit denied a stay of execution and denied an order authorizing the filing of a second federal habeas petition, which is required by Section 106 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132. The next day, this Court granted a writ of certiorari and stay of execution and directed briefing of the three questions stated on page i, *supra*.

SUMMARY OF ARGUMENT

Throughout the history of habeas corpus, the availability of the writ has expanded and contracted depending on the availability of other remedies. The present legislation is fully consistent with that evolution. Congress has decided that state courts deserve greater confidence now than in the past, and so the enormous costs of extended relitigation are no longer justified to the extent they once were.

The limitation on this Court's jurisdiction to review by certiorari the decision of a Court of Appeals not to allow a successive habeas petition is a very limited one, well within Congress's Article III power. This Court still has jurisdiction to grant an original writ in successive petition cases, but that power

should, by the Court's own rules, be exercised only in "extraordinary circumstances."

The Suspension Clause, as originally understood, requires neither federal habeas for state prisoners nor habeas as a mechanism of collateral attack on judgments of courts of competent jurisdiction. The only colorable argument that it requires either today is the contention that this provision has somehow "evolved" to mean something different than it did when it was enacted. Whatever justification there may be for such constitutional evolution in other contexts, this notion should not be applied to the question of when, by whom, and how many times a criminal judgment should be reviewed. This decision has always been within the legislative power to make.

ARGUMENT

I. The new legislation is fully consistent with the historical evolution of habeas corpus.

Habeas corpus legislation has, from the formation of the federal courts, consisted largely of a simple authorization to issue the writ, with few or no directions on when it should issue. See *Ex parte Watkins*, 3 Pet. 193, 201 (1830). In the legislative vacuum, the task of defining when an application should be entertained and when relief should be granted has fallen largely to the judiciary, sometimes with reference to the common law, see *id.*, at 201-202, sometimes with reference to precedent, see *Wright* v. *West*, 505 U. S. 277, 300-301 (1992) (O'Connor, J., concurring in the judgment), and sometimes with no explanation at all. See *Brown* v. *Allen*, 344 U. S. 443, 467-474 (1953) (proceeding to redetermine legal questions *de novo*, no reason given). The policy-making role thrust by default upon the judiciary has produced some heated dissents. See, *e.g.*, *Teague* v. *Lane*, 489 U. S. 288, 326-327 (1989) (Brennan, J., dissenting); *McCleskey* v. *Zant*, 499 U. S. 467, 506 (1991) (Marshall, J., dissenting).

With the passage of the landmark legislation now before the Court, the principal policymaker has at long last spoken. The character of the questions in this case, therefore, are far different from those in *Wright* v. *West*, *supra*, or *Keeney* v. *Tamayo-*

Reyes, 504 U. S. 1, 10 (1992). The question is not what *should* be done, but whether Congress had the authority to do what it did.

The wisdom of legislation is not a subject for judicial review. Even so, because of the vehement denunciations that always meet proposals for reform in this area, see Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 142 (1970), it is worth noting at the outset that this historic legislation is fully consistent with the historical evolution of habeas corpus.

The historical path is neither smooth nor straight. The availability of habeas corpus has expanded at some points and contracted at others. There has been, however, one discernable constant among the variables, sometimes expressly stated and sometimes implicit. The availability of habeas corpus to remedy an allegedly illegal or unjust imprisonment has depended upon the existence of alternate remedies and the policymaker's confidence in them.

The earliest statement of this principle can be found in *Bushell's Case*, 124 Eng. Rep. 1006 (1670). As is well known, the jurors in the politically charged trial of William Penn and William Mead refused to convict, were fined 40 marks, and were imprisoned until they paid the fine. *Id.*, at 1006. They sought habeas relief from the Court of Common Pleas. The court found a general return, merely reciting the judgment of the committing court, to be insufficient. "But our judgment ought to be grounded upon our own inferences and understandings, and not upon theirs." *Id.*, at 1007.

However, Chief Justice Vaughn carefully and expressly distinguished felony commitments, for which a general return would be sufficient. *Id.*, at 1009. "The cases are not alike; for upon a general commitment for treason or felony, the prisoner . . . may press for his tryal, . . . and upon his indictment and tryal, the particular cause of his imprisonment must appear, which proving no treason or felony, the prisoner shall have the benefit of it." *Id.*, at 1010.

Yet the only real difference between contempt and felony in this regard is the identity of the factfinder: the judge or the jury. The *Bushell* court lacked confidence in the judge acting alone in

contempt proceedings; it had full confidence in the jury. Hence an independent review on habeas was extended for contempts but denied for felonies.[2]

The First Congress provided a remedy for persons whose federal rights were denied by state courts. That remedy was a writ of error from this Court. Judiciary Act of 1789, § 25, 1 Stat. 85-87.[3] Thus, despite concern about whether the courts of some states would protect federal rights, see 1 Annals of Congress 843-844 (remarks of Mr. Madison), there was no perceived need for federal habeas for state prisoners. Congress flatly prohibited it, except for *habeas corpus ad testificandum*. Judiciary Act of 1789, § 14, 1 Stat. 81-82.

From the Judiciary Act through the Civil War, only two minor expansions of federal habeas were thought necessary. One was the "Force Act," extending the writ for persons imprisoned for carrying out federal law, Act of March 2, 1833, ch. 57, § 7, 4 Stat. 634-635, and the other was for foreign nationals asserting rights under international law. Act of August 29, 1842, ch. 257, 5 Stat. 539. In all other respects, state court remedies, subject only to a writ of error from the Supreme Court, were thought to be adequate.

In the wake of the Civil War, Congress was rightly concerned that enactments freeing the former slaves were not being obeyed, and that existing remedies were insufficient. The Habeas Corpus Act of 1867 was therefore introduced and passed. Mayers, The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian, 33 U. Chi. L. Rev. 31, 33-38 (1965); Forsythe, The Historical Origins of Broad Federal Habeas Review Reconsidered, 70 Notre Dame L. Rev. 1079, 1101-1117 (1995).

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2. *Bushell's Case* was not generally followed, even in contempt cases, after the political passions that surrounded it subsided. See *infra*, at 22-23.

3. Contrary to some assertions, see, *e.g.*, Brief of the American Bar Assn. as *Amicus Curiae* in *Wright* v. *West*, No. 91-542, p. 8, there *were* federal rights to be protected in the original Constitution. The Ex Post Facto Clause, U. S. Const., Art. I, § 10, cl. 1, and the supremacy of federal laws and treaties, *id.*, Art. VI, § 2, are just two examples. See *infra*, at 18 (discussion of *Ex parte Cabrera*).

After Reconstruction, Congress became alarmed that the lower federal courts were interpreting their authority under this act far more expansively than Congress had intended. The fact that some of the lower federal courts were overturning final judgments of competent courts, in violation of the rule in *Watkins*, 3 Pet., at 206, was a particular source of consternation. H. R. Rep. No. 730, 48th Cong., 1st Sess., 4-5 (1884). To correct this abuse, Congress decided to restore the appellate jurisdiction of the Supreme Court, in the confidence that this Court would rein in the lower federal courts. 15 Cong. Rec. 4710 (1884); Forsythe, *supra*, 70 Notre Dame L. Rev., at 1117-1124.

This bill did indeed have its intended effect for the remainder of the nineteenth century and the early years of the twentieth. *Ex parte Royall*, 117 U. S. 241, 253 (1886) promptly announced the "exhaustion doctrine," requiring that other remedies be exhausted before turning to federal habeas. Those remedies included a writ of error from the Supreme Court, "for final and conclusive determination," leaving nothing to be decided on habeas. *In re Wood*, 140 U. S. 278, 286 (1891), quoting *Robb* v. *Connolly*, 111 U. S. 624, 637 (1884).

The federal prisoner cases of the same era provide a striking contrast and illustrate the alternative remedies principle. While the Supreme Court was virtually shutting down federal habeas for state prisoners with the *Royall* doctrine, it was expanding habeas for federal prisoners at a breakneck pace. The *Watkins* rule that only jurisdictional defects could be examined on habeas corpus remained in force in theory, but in practice the Court took an increasingly broad view of what was "jurisdictional." See *Ex parte Siebold*, 100 U. S. 371, 376-377 (1879) (constitutionality of statute creating offense); *Ex parte Wilson*, 114 U. S. 417, 429 (1885) (lack of indictment).

Why the difference? Federal defendants had no other remedy. This Court had no general appellate jurisdiction in federal criminal cases at the time. See 1 R. Rotunda & J. Nowak, Treatise on Constitutional Law §2.2, p. 81, and n. 14 (2d ed. 1992).

In the late nineteenth and early twentieth century, this Court's appellate jurisdiction changed to a largely discretionary

one in both federal and state cases. *Id.*, at 83-84. This change, made necessary by the growth of the country, meant that the Court "could no longer perform its historic function of correcting constitutional error . . . and had to summon the inferior federal judges to its aid." Friendly, *supra*, 38 U. Chi. L. Rev., at 154. Thus, in *Moore* v. *Dempsey*, 261 U. S. 86, 92 (1923), habeas review in the federal district court was held to be proper, even though the Supreme Court had denied certiorari review of the case. *Id.*, at 98 (McReynolds, J., dissenting).

De novo review was not automatic, or even the norm, however. As late as 1944, this Court said, "Where the state courts have considered and adjudicated the merits of [the petitioner's] contentions, and this Court has either reviewed or declined to review the state court's decision, a federal court *will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated.*" *Ex parte Hawk*, 321 U. S. 114, 118 (1944) (emphasis added).

De novo review of all federal and constitutional questions decided by state courts was the rule from *Brown* v. *Allen*, 344 U. S. 443 (1953) until *Stone* v. *Powell*, 428 U. S. 465 (1976).[4] In a case of racial discrimination from a southern state in 1953, it is not difficult to see why state court remedies might be considered insufficient for the full implementation for the Equal Protection Clause. Similarly, during the criminal procedure revolution of the Warren Court years, there remained substantial resistance to the implementation of the new federal rights. See *Estes* v. *Texas*, 381 U. S. 532, 556 (1965) (Warren, C.J., concurring) (quoting state trial judge saying that the case was "not being tried under the Federal Constitution").

Stone v. *Powell* was the first major retrenchment from the virtually unlimited review created by *Brown* and *Fay* v. *Noia*, 372 U. S. 391 (1963), overruled in *Coleman* v. *Thompson*, 501 U. S. 722, 750 (1991). Creating an exception for exclusionary rule claims, *Stone* expressly reasserted the competence of state

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4. Whether *Brown* really stands for this rule is debatable. Compare *Wright* v. *West*, *supra*, 505 U. S., at 287-288 (lead opinion of Thomas, J.), with *id.*, at 300-301 (O'Connor, J., concurring in the judgment). Fortunately, this debate is now entirely academic.

courts to resolve federal constitutional questions. 428 U. S., at 493-494, n. 35. The *Teague* line of cases is also based in significant part on a renewed confidence in state courts. See *Caspari* v. *Bohlen*, 127 L. Ed. 2d 236, 249, 114 S. Ct. 948, 956 (1994).

Periods of expansion and contraction can similarly be seen in the availability of a second habeas review after rejection of the first petition. The common law rule was that denial of habeas relief was not *res judicata*. The reason for this rule was that there was no appeal from denial of the writ. Once appeal became available, courts began to hold that a prior denial on full consideration may be sufficient reason to deny a second application. *Ex parte Cuddy*, 40 F. 62, 65-66 (CCSD Cal. 1889) (Field, Circuit Justice); *Salinger* v. *Loisel*, 265 U. S. 224, 230-231 (1924).

Sanders v. *United States*, 373 U. S. 1 (1963) took a decidedly broader approach, opening the door to an unlimited number of habeas or section 2255 petitions so long as they stated grounds which had been neither deliberately withheld nor deliberately abandoned. See *id.*, at 17-18.

Despite its passing reference to the Suspension Clause, *id.*, at 11-12, *Sanders* was a policy choice and not a constitutional mandate. The opinion was decidedly legislative in tone: "formulation of basic rules to guide the lower federal courts is both feasible and desirable." *Id.*, at 15. When the abuses of the writ that naturally followed from *Sanders* led this Court to adopt a different policy, the dissent protested that the action was "foreclosed by the will of Congress" and not "a wise or just exercise of the Court's common-lawmaking discretion." *McCleskey* v. *Zant*, *supra*, 499 U. S., at 517. Again, this is a policy dispute and not a constitutional mandate.

In summary, the scope of habeas corpus, the degree of deference to prior adjudications, and the willingness to consider repeated applications have all varied throughout the history of the writ. None of them is carved in stone. They are questions of policy which the judiciary has decided in the absence of clear statutory rules, but which have always been within the legislative authority to alter. See *Brown* v. *Allen*, *supra*, 344 U. S., at 499 (opinion of Frankfurter, J.).

The proponents of unlimited relitigation argued long and forcefully to Congress that the reforms it was considering would be bad policy. See generally Habeas Corpus Issues, Serial No. 39, 102d Cong., 1st Sess. (1991) (numerous statements by advocates on both sides). The policy debate is over. The policymaker has spoken. The only question in this case is whether Congress exceeded its authority by placing limits on a use of habeas corpus which the common law did not permit *at all*. The answer, we will show in the parts that follow, is no.

II. Section 2244(b)(3)(E) is a valid, very limited exception to this Court's appellate jurisdiction.

> "2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned [in clause 1, defining the federal judicial power], the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such *exceptions*, and under such *regulations* as the *Congress* shall make." U. S. Const., Art. III, § 2, cl. 2 (emphasis added).

By enacting 28 U. S. C. § 2244(b)(3)(E),[5] Congress has exercised a power expressly assigned to it by the Constitution. Question 1 in this Court's order of May 3, 1996, asked whether this is unconstitutional. The answer is clearly no, both on the face of the Constitution and by thoroughly established precedent. See *Ex parte McCardle*, 7 Wall. 506, 514 (1869).

Congress has exercised its exception-making power from the very beginning of the federal judiciary, and it has done so in far broader terms than the very narrow and limited exception in the present statute. The Supreme Court's appellate jurisdiction over federal courts was originally limited to civil cases. Judiciary Act of 1789, § 22, 1 Stat. 84. There was no criminal appellate jurisdiction at all. See *Ex parte Watkins*, 3 Pet. 193, 203 (1830). There were vitally important criminal law questions at the time,

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5. "The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or writ of certiorari."

such as the validity of the Sedition Act, but this Court had no jurisdiction to review them on appeal.

In federal civil cases, appellate jurisdiction was limited to cases where at least two thousand dollars was in dispute. This limitation cut off appellate jurisdiction in cases where the disputed question could not be assigned a monetary value, however important it may have been to the parties. See *Barry* v. *Mercein*, 5 How. 103, 120 (1847) (habeas for child custody).

Finally, *McCardle*, *supra*, established that Congress could take away appellate jurisdiction in a class of cases, even when it did so to prevent this Court from reaching a particular issue.

Petitioner's assertion that there is a constitutional imperative for appellate jurisdiction to resolve intercircuit conflicts, Pet. for Cert. 8, has no support in text or history. To the extent he makes a policy argument, he is making it to the wrong branch of government.

In addition to text and history, there is one more reason for great caution with regard to judicial review of Congressional limitations on jurisdiction. That reason is similar to the one stated in the recent impeachment case, *Nixon* v. *United States*, 122 L. Ed. 2d 1, 113 S. Ct. 732 (1993). Among the reasons that the Senate's impeachment procedures were held nonjusticiable was the effect such review would have on the separation of powers. "[J]udicial review would be inconsistent with the Framers' insistence that our system be one of checks and balances." *Id.*, at 12, 113 S. Ct., at 738. "Nixon's argument would place final reviewing authority with respect to impeachments in the hands of the same body that the impeachment process is meant to regulate." *Id.*, at 13, 113 S. Ct., at 739.

Although impeachment was thought to be the primary "check on the Judicial Branch by the Legislature," *Nixon*'s assertion that it was "designed to be the *only* check," *id.*, at 12, 113 S. Ct., at 738 (emphasis in original), is a bit of an overstatement. Congress's Article III power to make exceptions to jurisdiction and to regulate the judiciary is also an important check. It is good for the judiciary and the nation that Congress uses its impeachment power extremely sparingly, but in a system of checks and balances there must be some check, and control over jurisdiction provides an alternative.

When the judiciary is asked to judge the validity of a check upon itself, it is placed in the awkward position of judging its own case. Restraint is always in order when a litigant seeks to invoke the awesome power of judicial review of legislative action, see *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 501-502 (1985), but this is even more true in cases such as *Nixon* and the present case, where one of the very few constitutional checks on the judiciary is in question.

One can imagine hypothetical horribles in which Congress might transgress some other provision of the Constitution while exercising its Article III exception-making power. For example, a statute declaring that people of one race can appeal while those of another cannot would violate the Due Process Clause. See *Adarand Constructors* v. *Peña*, 132 L. Ed. 2d 158, 187, 115 S. Ct. 2097, 2117 (1995) (equal protection component, strict scrutiny). The present statute contains no suspect classifications.

An odd statute exceeding the exception-making power can be found in *United States* v. *Klein*, 13 Wall. 128 (1872). In that case Congress did not abolish jurisdiction in a defined class of cases, as in *McCardle* and the present case, but instead directed this Court to dismiss for want of jurisdiction only if the case had been decided a certain way. *Id.*, at 143. This statute violated the separation of powers. *Id.*, at 147. Jurisdiction cannot be granted for a class of cases yet divested upon a particular decision. *Ibid.* To allow jurisdiction to depend on which side prevails would be, in effect, letting the legislative branch decide the case.

The limited, neutral statute in the present case stands in sharp contrast to the one in *Klein*. For a particular class of court orders, Congress has made a policy decision that the delays inherent in appellate review impose a cost which exceeds the benefit of such review. That is precisely the policy choice that Article III empowers Congress to make. Far from upholding the Constitution, the judiciary would grievously *violate* the Constitution if it attempted to usurp for itself a decision which the unmistakable text of the document assigns squarely to another branch of government.

The writ of certiorari should be dismissed for want of jurisdiction.

III. This Court still has jurisdiction to entertain original habeas petitions, but that jurisdiction should rarely be exercised.

The statute in question removes jurisdiction for review of an order granting or denying permission to file a successive habeas petition via the methods of appeal and writ of certiorari. The statute says nothing about filing an original habeas petition in this Court. *Ex parte Yerger*, 8 Wall. 85, 105 (1869) settled long ago that removal of the regular route of appeal does not remove jurisdiction to entertain an application for an original writ.

A writ of habeas corpus for a state prisoner is an order issued to an executive officer. Such an order would normally be an exercise of original jurisdiction, and this Court's original jurisdiction is narrowly limited by the Constitution. See *Marbury* v. *Madison*, 1 Cranch 137, 175 (1803). In habeas cases, however, this Court has looked to the practical effect of the writ rather than its form. The writ has been held appellate in nature for this purpose whenever its practical effect is to revise a decision of another court. *Ex parte Bollman*, 4 Cranch 75, 101 (1807); *Ex parte Watkins*, 7 Pet. 568, 572-573 (1833) ("*Watkins II*"); *Yerger*, *supra*, 8 Wall., at 99. Since petitioner Felker is in custody pursuant to the judgment of a court, there can be no doubt that the exercise of jurisdiction would be "appellate" within the broad meaning *Bollman*, *Watkins*, and *Yerger* gave that term.

Congress left this jurisdiction intact against a backdrop of existing statutes, rules, and practice. Rule 20.4(a) of the Supreme Court Rules provides:

> "4. (a) A petition seeking a writ of habeas corpus shall comply with the requirements of 28 U. S. C. §§ 2241 and 2242, and in particular with the provision in the last paragraph of § 2242, which requires a statement of the 'reasons for not making application to the district court of the district in which the applicant is held.' If the relief sought is from the judgment of a state court, the petition shall set out specifically how and where the petitioner has exhausted available remedies in the state courts or otherwise comes within the provisions 28 U. S. C. § 2254(b). To justify the granting of a writ of habeas corpus, the petitioner must show

> that *exceptional circumstances* warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court. *This writ is rarely granted.*" (Emphasis added.)

A petitioner who has previously applied for permission to file in district court and been denied, as Felker has, certainly has a reason for not filing there. That reason alone, however, does not constitute "exceptional circumstances." Indeed, that will be quite the usual circumstance.

As we will discuss further in the next part, the substantive conditions for filing a successive application in the district court also apply to original applications in this Court. A denial of permission by the court of appeals is a determination that the petitioner does not meet the criteria. That determination will almost never be an appropriate one for review by this Court.

Under 28 U. S. C. § 2244(b)(2)(A), a second petition can be considered if "the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review *by the Supreme Court*, that was previously unavailable; . . . ." (Emphasis added.) *Teague* v. *Lane*, 489 U. S. 288 (1989) recognizes two categories of retroactivity on collateral review. One is for categorical exemptions from punishment, *i.e.*, cases where the act cannot be made criminal or where this punishment cannot be imposed on this defendant for this crime regardless of the procedure by which the judgment was obtained. See *id.*, at 311; *Penry* v. *Lynaugh*, 492 U. S. 302, 330 (1989). Few habeas cases present substantial claims along this line.

The second exception is far more often sought, but this Court has never found it applicable. It is limited to "watershed rules of fundamental fairness" which "alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." *Sawyer* v. *Smith*, 497 U. S. 227, 242 (1990) (internal quotation marks omitted; emphasis in original). This Court has repeatedly noted that "it is 'unlikely that many such components of basic due process have yet to emerge,' " *id.*, at

243 (quoting *Teague*), and this Court has yet to find one.[6] Petitions with substantial claims to qualify under the retroactive rule clause will therefore be very rare.

The other route that Congress has left open for successive petitions involves a pair of intensely fact-bound questions particularly unsuited for Supreme Court review. One involves the ability of the petitioner to have discovered the relevant facts before or during the first petition, and the other involves the strength of his claim of actual innocence. 28 U. S. C. § 2244(b)(2)(B)(i) and (ii). Both hurdles must be cleared.

Even on certiorari, a decision to take a case on such fact-bound questions is quite rare. See *Kyles* v. *Whitley*, 131 L. Ed. 2d 490, 520, 115 S. Ct. 1555, 1576 (1995) (Scalia, J., dissenting). Given the higher "exceptional circumstances" standard for original habeas, it should be expected that this Court will almost never entertain an application on this basis.

IV. Those portions of Title I which establish standards for the entertaining and disposition of habeas petitions apply to original petitions in this Court.

The authority to issue writs of habeas corpus is given to all of the federal courts and judges which have such authority by a single statute: 28 U. S. C. § 2241. Furthermore, the grounds on which these federal courts and judges can grant the writ to a prisoner are stated in subdivision (c) of that section. The early cases on original writs in this Court decided the propriety of issuing the writ, as distinguished from the jurisdiction to issue it, on the basis of the same principles which would control the decision in any court with jurisdiction. See, *e.g.*, *Ex parte Watkins*, 3 Pet. 193, 201-202 (1830) (statute does not specify, turn to the common law).

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6. Congress has expressly limited the qualifying rules to those *this Court* has found retroactive, expressing doubts about the *Teague*-exception decisions of the lower federal courts. That lack of confidence is well justified. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Maryland* v. *Grandison*, No. 92-207, pp. 3-6.

Both statutes and rules discourage original filings with appellate courts and judges and authorize refusal of the writ or transfer to the district court. See 28 U. S. C. § 2241(b); Fed. Rule App. Proc. 22 (amended, Pub. L. 104-132, § 103); Supreme Court Rule 20.4(a). Other than this, the standards have been the same in all courts. If Congress had intended to change that situation, particularly in the direction of making habeas law *less* restrictive in this Court than in district courts, it presumably would have said so.

Examining sections 101 through 106 of the new act,[7] we see both standards addressed to habeas cases generally, without specifying any court, and rules addressed particularly to district and circuit courts and judges. This first type applies to original petitions in this Court, while the second type does not.

Section 101 establishes a statute of limitation. For such a statute to vary among different courts of the United States would be highly unusual, if not unique, and nothing in the language indicates an intent to depart from the norm.

Section 102 deals specifically with appeals from the district court to the court of appeals. It has no application to original writs in this Court.

Section 103 amends the Federal Rules of Appellate Procedure, which only apply to the courts of appeals and their judges. Fed. Rule App. Proc. 1(a).

Section 104 amends 28 U. S. C. § 2254. This section has always applied to original writs in this Court by state prisoners, as Rule 20.4(a) recognizes. New subsection (d), the deference standard, is the most important change. It effectively modifies the standard for granting habeas relief. It is a partial, but not complete, return to the rule of *Ex parte Watkins*, that custody pursuant to an unreversed judgment of a competent court is not illegal for the purpose of a habeas petition. See *infra*, at 25-26. This substantive standard applies to original petitions in this Court.

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7. The state has not claimed that the special limitations in section 107 apply.

Section 105 amends 28 U. S. C. § 2255. Motions under this section must be made in the sentencing court. A 2255 motion is not a habeas petition. *United States* v. *Hayman*, 342 U. S. 205, 220 (1952). This section does not apply to habeas petitions in this Court, or any court.

Section 106 makes both kinds of rules in its changes to section 2244(b). Paragraphs (1) and (2) establish substantive rules for the consideration of successive petitions. They are phrased in general terms and not directed to any particular court. They apply to all federal habeas cases. Paragraphs (3) and (4) are directed specifically to district courts. Congress was evidently concerned about idiosyncratic application of the new law by individual district judges. Neither the language nor the problem it addresses applies to original applications in this Court.

In summary, the provisions of sections 101 through 106 which apply to original petitions in this Court are:

(1) The one-year statute of limitation. (§ 101, 28 U. S. C. § 2244(d)).

(2) The amendments to 28 U. S. C. § 2254. (§ 102):

(b) The modified exhaustion rule.

(d) The deference standard.

(e) The modified presumption of correctness.

(h) Appointment of counsel.

(i) Codification of the rule that ineffectiveness on habeas is not a ground for habeas relief.

(3) The substantive standards for when a successive petition may be considered. (§ 106, 28 U. S. C. § 2244(b)(1) and (2)).

V. The Constitution does not require federal habeas for state prisoners at all.

The final question on which this Court requested briefing was "Whether application of the Act in this case is a suspension of the writ of habeas corpus in violation of Art. I, § 9, clause 2 of the Constitution." The answer is no for two reasons, either

of which is sufficient alone. We will address the first reason in this Part V and the second reason in Part VI, *infra*.

A. The Original Understanding.

The Judiciary Act of 1789 "was passed by the first Congress assembled under the Constitution, many of whose members had taken part in the framing of that instrument, and is contemporaneous and weighty evidence of its true meaning." *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 297 (1888). The Act had this to say about federal habeas for state prisoners: "*Provided*, That writs of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." § 14, 1 Stat. 82.

Between this Act and the present question, there are only three logical possibilities. Either (1) the Suspension Clause does not require habeas corpus in federal courts for state prisoners;[8] (2) the state-prisoner limitation in the Act was unconstitutional; or (3) the limitation was constitutional when enacted, but the Suspension Clause has since "evolved" so that Congress could not enact the same clause today. To establish the first possibility, it is necessary only to refute the other two.

The contemporary understanding of the Suspension Clause rests not only on the clear wording of the Judiciary Act,[9] but also from the lack of controversy surrounding it. Cf. *Lee* v. *Weisman*, 505 U. S. 577, 626 (1992) (Souter, J., concurring) (Alien and Sedition Acts, which were hotly contested, are not authoritative guide to First Amendment). The high regard for the writ of habeas corpus at the time of the Constitution is well

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8. Duker, after examining the history of the clause, concludes the original intent was just the opposite, "to restrict Congress from suspending *state* habeas for *federal* prisoners . . . ." W. Duker, A Constitutional History of Habeas Corpus 155 (1980) (emphasis added).

9. *Marbury* v. *Madison*, 1 Cranch 137 (1803) did, of course, hold a portion of the same act unconstitutional. That case, however, involved an application that was anything but clear from the face of the language and probably never occurred to Congress.

known. See, *e.g.*, The Federalist No. 84, pp. 511-512 (C. Rossiter ed. 1961) (A. Hamilton); L. Martin, Genuine Information (1788), reprinted in 3 The Founder's Constitution 328 (P. Kurland & R. Lerner eds. 1987); T. Jefferson, Letter to James Madison, July 31, 1788, reprinted in 1 The Founder's Constitution, at 476. It is simply inconceivable that a clear and blatant violation of a cherished right would have been enacted without controversy and uniformly enforced by the courts. Yet that is what happened with this provision.

Amidst the controversies that swirled around the Judiciary Act, section 14 was a calm pool of consensus. The section was enacted by the Senate from the first draft, with only one minor amendment relating to a different writ. Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 95 (1923). The main debate in the House was whether to create lower federal courts at all. See *id.*, at 123-131.

The state-prisoner limitation was invoked in *Ex parte Cabrera*, 4 F. Cas. 964 (No. 2,278) (CCD Pa. 1805). Cabrera was a secretary to the Spanish legation charged with forgery in Pennsylvania; he claimed diplomatic immunity, embodied in a federal statute. *Id.*, at 964-965. Justice Bushrod Washington, sitting as Circuit Justice, reluctantly decided the circuit court had no jurisdiction. First, he noted that the lower federal courts had no jurisdiction at all except what is conferred on them by statute. *Id.*, at 965. There is no hint that a different rule applies to habeas corpus. Section 14 of the Judiciary Act was then clear and on point. *Id.*, at 966. Judge Peters concurred. *Id.*, at 965.

Justice Washington was a member of the *Marbury* Court and obviously aware of that then-recent decision. He could not have doubted his authority to declare this limitation unconstitutional if he thought it were. It seems that the constitutionality of the limitation was clear, whatever his doubts about its wisdom. See *id.*, at 966. Accord, *United States* v. *French*, 25 F. Cas. 1217, 1217 (No. 15,165) (CCD N.H. 1812).

The state-prisoner limitation was so well settled that it did not reach this Court for over 50 years. *Ex parte Dorr*, 3 How. 103 (1845) involved a defendant convicted of treason against the

State of Rhode Island. He moved for an original writ of habeas corpus in the Supreme Court. *Id.*, at 104.

The Court held it had no jurisdiction due to the state-prisoner limitation of section 14. "Neither this nor any other court of the United States; or judge thereof, can issue a *habeas corpus* to bring up a prisoner, who is in custody under a sentence or execution of a State court, for any other purpose than to be used as a witness." *Id.*, at 105.

The validity of the state-prisoner limitation appears to have been universally acknowledged. *Amicus* has not found a single doubt expressed on the subject by any antebellum authority. See, *e.g.*, R. Hurd, A Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus 154 (1st ed. 1858). Any contention that the Suspension Clause required federal habeas for state prisoners at the time of the Founding would appear to be utterly unsupportable.

B. The "Living Constitution."

A law review article written in anticipation of the present legislation takes the position that the Suspension Clause forbids time limits on habeas corpus petitions by state prisoners collaterally attacking their convictions. Mello & Duffy, Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates, 18 Review of L. & Social Change 451 (1991). Yet even this partisan article has to admit that the clause as originally enacted applied only to federal prisoners. *Id.*, at 462. The only ground these authors can find to make their stand is the last redoubt of judicial autocracy: the "living Constitution." *Id.*, at 472.

The Suspension Clause is not the only provision of the Constitution at issue in this case. Article I, section 1 provides "All legislative powers herein granted shall be vested in a Congress of the United States . . . ." The capacity to make the policy choices at issue in this case was originally within the legislative power. By what means did it cease to be? The Constitution has not been amended to make that change.

Justices of this Court supporting broad federal habeas for state prisoners have repeatedly insisted that the Reconstruction

Congress made that choice. See *Brown* v. *Allen*, 344 U. S. 443, 499 (1953) (opinion of Frankfurter, J.); *Fay* v. *Noia*, 372 U. S. 391, 417-418 (1963), overruled on other grounds in *Coleman* v. *Thompson*, 501 U. S. 722, 750 (1991); *Butler* v. *McKellar*, 494 U. S. 407, 427-430 (1990) (Brennan, J., dissenting). Assuming this to be true for the sake of argument, does a policy choice made in a time of grave national crisis forever bind future Congresses, so that policy cannot be adjusted to meet changing times? Particularly where the critical question is confidence in state courts, see *Butler*, 494 U. S., at 430 (dissent), the policy-maker should be able to make adjustments as state courts grow more worthy of confidence.

To be sure, there are a few decisions of this Court that construe constitutional provisions to forbid practices that would clearly have been considered valid when those provisions were adopted. See, *e.g.*, *Bloom* v. *Illinois*, 391 U. S. 194, 196 (1968) (requiring jury trial for 2-year contempt punishment); *Roe* v. *Wade*, 410 U. S. 113, 174-177 (1973) (Rehnquist, J., dissenting) (numerous abortion laws in effect at time of Fourteenth Amendment).

Whatever legitimacy such decisions may have in the realm of the most intimate personal decisions, see *Planned Parenthood* v. *Casey*, 120 L. Ed. 2d 674, 699, 112 S. Ct. 2791, 2807-2808 (1992) (lead opinion), or in striking down practices acknowledged to be tyrannical even at common law, see *Bloom*, 391 U. S., at 198-199, n. 2, the present case is one of an entirely different character. It does not concern what acts will be legal or illegal. It does not concern what protections defendants will receive at trial. It concerns only when, by whom, and how many times that trial will be reviewed, decisions which have always been within the legislative power to make.

The assertion has repeatedly been made that the constitutional mandate has "evolved" since the enactment of the Suspension Clause. See, *e.g.*, Mello and Duffy, *supra*, 18 Review of L & Social Change, at 462. What is really sought here, however, is not evolution, but the Big Bang.

No decision of this Court holds that Congress has *any* obligation to extend federal habeas to state prisoners. The principal implication that it might is a dictum in a since-over-

ruled case. See *Fay*, *supra*, 372 U. S., at 406.[10] There is no historical, textual, or controlling precedential support for an argument that Congress has less than complete authority over these matters. Cf. *Carlisle* v. *United States*, No. 94-9247, slip op., at 14 (Apr. 29, 1996).

The history of federal habeas for state prisoners is not an evolution of a constitutional doctrine but the evolution of a statutory enactment. That evolution has occurred through a combination of expansive decisions by this Court with Congress's failure to abrogate them. See *Wright* v. *West*, 505 U. S. 277, 305-306 (1992) (O'Connor, J., concurring in the judgment). But this Court's reluctance to overrule its statutory construction precedents, however dubious, is premised squarely on the fact that Congress *can* abrogate them. *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172-173 (1989). To say at this point that these decisions have been suddenly removed from the legislative power would be playing a constitutional shell game with the American people.

In *Wright* v. *West*, No. 91-542, the proponents of broad federal habeas vehemently asserted that the question belonged to Congress and not the judiciary. Brief of the American Bar Assn. as *Amicus Curiae* 7; Brief of American Civil Liberties Union as *Amicus Curiae* 2-3; Brief of Gerald Gunther *et al.* as *Amici Curiae* 53-55; Brief of Benjamin R. Civiletti *et al.* as *Amici Curiae* 29-30. The stalemate in that case effectively told the American people that the judiciary could not help them; those seeking justice for murder victims must turn to Congress to lift capital punishment out of the habeas quicksand. They did. It did. For this Court to do an about-face now and declare that these decisions are not within the legislative power after all would be a massive breach of faith with the American people.

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10. Not only is *Fay* an overruled case, but its historical dissertation has long since been discredited. See Mayers, The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian, 33 U. Chi. L. Rev. 31, 32 (1965); Oaks, Legal History in the High Court—Habeas Corpus, 64 Mich. L. Rev. 451, 459 (1966).

Federal habeas for state prisoners was a subject entirely within the legislative power in 1789, and it remains so today. The Suspension Clause is inapplicable.

VI. The Constitution does not require habeas review of convictions by courts of general jurisdiction.

No legal myth has proved so persistent with so little basis as the motion that the "Great Writ" of the common law was a device for collaterally attacking convictions, not otherwise subject to review, of courts of competent jurisdiction. It quite simply was not.

Assertions to the contrary invariably cite *Bushell's Case*, 124 Eng. Rep. 1006 (1670), discussed *supra*, at 4-5. See *Fay* v. *Noia*, 372 U. S. 391, 403 (1963), overruled in *Coleman* v. *Thompson*, 501 U. S. 722, 750 (1991); Liebman, Apocalypse Next Time? The Anachronistic Attack on Habeas Corpus/Direct Review Parity, 92 Colum. L. Rev. 1997, 2042, n. 241 (1992). The fact that Chief Justice Vaughn expressly distinguished criminal trials from contempt citations, see *supra*, at 4-5; Oaks, *supra*, 64 Mich. L. Rev., at 463, 466-467, goes unnoticed in these citations. Given all the reliance placed on it by modern American writers, one would think that *Bushell's Case* was the definitive word on habeas corpus in England. It was not. In later cases we see contrary results reached and the broad language of *Bushell's Case* questioned.

In *Brass Crosby's Case*, 95 Eng. Rep. 1005 (1771), *Bushell's Case* was cited by a prisoner seeking habeas corpus to review a commitment by the House of Commons. *Id.*, at 1005, 1008. The Court of Common Pleas held it could "do nothing when a person is in execution, by the judgment of a Court having a competent jurisdiction; in such case, this Court is not a Court of Appeal." *Id.*, at 1011 (opinion of de Grey, C.J.). The Houses of Parliament were considered superior courts for this purpose, and "no other Court shall scan the judgment of a Superior Court." *Id.*, at 1014 (opinion of Blackstone, J.).

King v. *Suddis*, 102 Eng. Rep. 119 (1801) postdates the American Revolution, but it gives us a view of English law in that era, as there is no implication in this case of any recent

change. Suddis was court-martialed in Gibralter and challenged his sentence on habeas corpus. "It is enough that we find such a sentence pronounced by a Court of competent jurisdiction to inquire into the offense, and with power to inflict such punishments." *Id.*, at 123.[11]

Early American cases, both state and federal, are fully consistent with this view. Chancellor Kent states flatly that the prisoner "is to be remanded, if detained . . . by virtue of any final decree, or judgment, or process thereon of any competent court of civil or criminal jurisdiction." 2 J. Kent, Commentaries 30 (3d ed. 1836). *Riley's Case*, 19 Mass. 171, 171 (1824) held that habeas was unavailable to persons in execution, tracking the language of the Habeas Corpus Act.[12] "[I]t is clear that on the habeas corpus the court cannot look behind the sentence of the court, where the jurisdiction is undoubted." *Johnson* v. *United States*, 13 F. Cas. 867, 868 (No. 7,418) (CCD Mich. 1842).

Professor Oaks' survey of early state cases is consistent with a rule against the use of the writ to attack criminal judgments of courts of general jurisdiction. Oaks, Habeas Corpus in the States—1776-1865, 32 U. Chi. L. Rev. 243, 261-262 (1965).[13] In fact, there appear to be few attempts to use the writ for this purpose prior to 1850. *Id.*, at 261, n. 84.[14]

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11. In *Burdett* v. *Abbot*, 104 Eng. Rep. 501, 529 (1811), Lord Chief Justice Ellenborough states that the broad language of *Bushell's Case*, "without any qualification or restriction as to commitments by Inferior Courts," is doubtful.

12. The rule was different if the person was committed by an inferior court or officer acting in excess of jurisdiction. See, *e.g.*, *Geyger* v. *Stoy*, 1 Dall. 135 (Pa. 1785) (judgment by justice of the peace in case exceeding his jurisdictional amount in controversy).

13. There were some deviations in contempt cases, which Professor Oaks attributes to the lack of other remedies in such cases. *Id.*, at 263. This is consistent with the hypothesis of Part I of this brief, *supra*, at 3-9, and with *Bushell*'s distinction between contempt and criminal cases.

14. One possible explanation for the increase after that time was the growing acceptance of the idea that unconstitutionality of the underlying statute was a ground for habeas relief. See *id.*, at 263, n. 94 (citing cases from

Against this background, the great case of *Ex parte Watkins*, 3 Pet. 193 (1830) becomes even more clear. *Fay* v. *Noia*, *supra*, 372 U. S., at 407 attempted to dismiss *Watkins* as dealing with the specific jurisdictional problems of this Court. This was a transparent evasion of a clear but inconvenient precedent. *Watkins* is squarely based on general habeas principles.

The jurisdiction of this Court to entertain and issue original writs was well-plowed ground long before *Watkins*. In the famous case of *Marbury* v. *Madison*, 1 Cranch 137 (1803), Chief Justice Marshall first determined that Marbury had a right to his commission. *Id.*, at 168. That left the question of whether he had chosen the appropriate remedy, *ibid.*, which in turn had two subsidiary questions: "1st. The nature of the writ applied for, and, ¶ 2dly. The power of this court." *Ibid.* The general law question of the propriety of mandamus, *id.*, at 168-173, is thus cleanly separated from the court-specific question of power, *i.e.*, jurisdiction. *Id.*, at 173-180. That same clean, unmistakable separation can be seen in Chief Justice Marshall's habeas opinions.

Ex parte Bollman, 4 Cranch 75 (1807) was a *pretrial* application for habeas corpus by two persons held for trial for treason in the Aaron Burr plot. See *id.*, at 75-76. Addressing the jurisdictional question, Chief Justice Marshall first rejected the notion that any court of the United States had any inherent authority to issue writs of habeas corpus. *Id.*, at 93-94. That authority can only be conferred by a constitutional statute. *Id.*, at 94. The opinion then proceeds to find the jurisdiction conferred by the Judiciary Act. *Id.*, at 94-100.

Before proceeding to the constitutional question, the Court paused to consider the propriety of granting the writ. "If by a sound construction of the act of congress, the *power* to award writs of *habeas corpus* in order to examine into the cause of commitment, is given to this court, it remains to inquire, whether this be a case in which it *ought* to be granted." *Id.*, at

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the 1850's).

100 (emphasis added). It would be difficult to write the opinion to separate the two questions more clearly.[15]

After this pause, Chief Justice Marshall returned to the jurisdictional question, asking whether the statute granting the power was constitutional under *Marbury*. 4 Cranch, at 100-101. Again, we see the word "power" used in discussing the jurisdictional question.

In *Watkins*, the petitioner had been convicted by the Circuit Court for the District of Columbia, and sought habeas corpus in the Supreme Court. 3 Pet., at 201. The jurisdictional question, having been settled in *Bollman*, required only brief mention. "No doubt exists respecting the *power*; the question is, whether this be a case in which it *ought* to be exercised." *Watkins*, 3 Pet., at 201 (emphasis added). The remainder of the opinion discusses general principles, with no further mention of the original versus appellate jurisdiction issue.

Watkins notes "the celebrated habeas corpus act" and that it "excepts from those who are entitled to its benefit . . . persons convicted or in execution." *Id.*, at 202. The opinion then states the general question. "The petitioner is detained in prison by virtue of the judgment of a court, which court possesses general and final jurisdiction in criminal cases. Can this judgment be re-examined upon a writ of *habeas corpus*?" *Ibid.*

The answer, on general principles, is no. "An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous." *Id.*, at 203.

In other words, although denial of habeas is not *res judicata*, the habeas court itself must respect as *res judicata* the unreversed final judgment of a competent court. "The judgment of a court

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15. On the merits of this question, the Court refers to the arguments of counsel. *Ibid.* Counsel cited *Bushell's Case*, *supra*, *Wood's Case*, 3 Wils.K.B. 173, 95 Eng. Rep. 996 (1771), and *Ex parte Burford*, 3 Cranch 448 (1806). See 4 Cranch, at 91-92. None of these was a collateral attack on a conviction of a crime. *United States* v. *Hamilton*, 3 Dall. 17 (1795), relied on by the *Bollman* Court, 4 Cranch, at 100, was similarly a pretrial bail case.

of record, whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court *as it is on other courts*. It puts an end to inquiry concerning the fact by deciding it." *Id.*, at 202-203 (emphasis added). Cases where habeas was granted were distinguished on the basis that "In no one of these cases was the prisoner confined under the judgment of a court." *Id.*, at 208.

Fay's statement that *Watkins* is only authority as to this Court's power to issue the writ, and not as to other federal courts and judges, 372 U. S., at 407, is specious. This error can be seen not only in the plain wording of the opinion, 3 Pet., at 201, but also in the fact that *Watkins* was routinely followed by state and lower federal courts for its general rule. See, *e.g.*, *In Re Callicot*, 4 F. Cas. 1075, 1076-1077 (CC EDNY 1870); *Ex parte Gibson*, 31 Cal. 620, 627-628 (1867).

Nor did the constitutional nature of the claim make a difference. Watkins came back to the Supreme Court three years later on another habeas. He was imprisoned for nonpayment of a fine which he claimed was excessive in violation of the Eighth Amendment. *Ex parte Watkins*, 7 Pet. 568, 573 (1833). This was a collateral attack on a final judgment grounded squarely in an express constitutional guarantee.

Justice Story's opinion first revisits the *Marbury* problem once again, reaffirming that the jurisdiction sought is appellate and not original within the meaning of Article III. *Id.*, at 572-573. He then declined to address the merits of the Eighth Amendment claim. *Id.*, at 573-574. The judgment of the Circuit Court was binding.

Although the concept of "jurisdictional defect" was greatly stretched in the late nineteenth century, the basic rule of *Watkins* remained in effect into the twentieth. In *Matter of Moran*, 203 U. S. 96, 105 (1906), Justice Holmes, for a unanimous Court, tersely refused to consider the merits of a self-incrimination

claim. Even though constitutional,[16] his claim was not jurisdictional. No habeas review.

Habeas corpus came to be available for all constitutional claims, regardless of the availability or adequacy of other remedies, only in the middle of the twentieth century. See Bator, Finality in the Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 498-499 (1963). How, then, can the Suspension Clause, adopted in 1789, entitle Felker to a type of review which neither state nor federal convicts had from 1789 through at least the 1930's, and possibly the 1940's, a span of at least 150 years? That could only be if the Suspension Clause has "evolved."

The argument against such an evolution in part IV B, *supra*, applies as well to this point. There are no precedents holding that Congress has an obligation to provide habeas corpus in a more expansive form than the common law or the Habeas Corpus Act permitted. There is no reason to create such a precedent out of whole cloth.

Relitigation of final convictions imposes a heavy cost. Policy arguments for limits are substantial. See generally, K. Scheidegger, Overdue Process: A Study of Federal Habeas Corpus in Capital Cases and a Proposal for Reform (1995). This Court need not weigh them. The policymaker has done so. It has spoken. Its decision is within its constitutional authority.

VII. The petitioner does not qualify for a successive habeas petition.

Petitioner claims to seek the benefit of *Cage* v. *Louisiana*, 498 U. S. 39, 41 (1990) (*per curiam*), overruled on other grounds in *Estelle* v. *McGuire*, 502 U. S. 62, 72, n. 4 (1991),

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16. Moran was convicted in a territorial court. 203 U. S., at 103. The Bill of Rights was fully applicable. See *Thompson* v. *Utah*, 170 U. S. 343, 346 (1898), overruled on other grounds in *Collins* v. *Youngblood*, 497 U. S. 37, 51-52 (1990). One attempt to dismiss *Moran*, Peller, In Defense of Federal Habeas Corpus Relitigation, 16 Harv. C.R.—C.L. L. Rev. 579, 615, n. 194 (1982), appears to be oblivious to the distinction between states and territories.

but, as the Court of Appeals held, he seeks to extend that case well beyond current law. *Felker* v. *Turpin*, No. 96-1077, Part II A (CA4 May 2, 1996). The extension he seeks, if it has merit at all, "has none of the primacy and centrality of the rule adopted in *Gideon* . . . ." *Cf. Saffle* v. *Parks*, 494 U. S. 484, 495 (1990). His second claim seeks to invade the province of state evidence law in a way which this Court has repeatedly declined to do. See *Estelle* v. *McGuire*, 502 U. S. 62, 70 (1991). The facts underlying both claims were known at trial. His claim of innocence is nothing more than a request to second-guess the finder of fact regarding the credibility of witnesses. This is precisely the kind of successive petition that Congress determined should not be considered.

CONCLUSION

The writ of certiorari should be dismissed for want of jurisdiction. The petition for writ of habeas corpus should be denied.

May, 1996

Respectfully submitted,

KENT S. SCHEIDEGGER

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Criminal Justice Legal Foundation

(11)

No. 95-8836

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ELLIS WAYNE FELKER, *Petitioner*,

v.

TONY TURPIN, Warden, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND PETITION FOR WRIT OF HABEAS CORPUS

BRIEF OF AMICI CURIAE ALABAMA, ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, KENTUCKY, MASSACHUSETTS, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NEW YORK, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, WASHINGTON, WISCONSIN, and WYOMING IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996 (the Act), and in particular Section 106(b)(3)(E), 28 U.S.C. § 2244(b)(3)(E), is an unconstitutional restriction of the jurisdiction of this Court.

2. Whether and to what extent the provisions of Title I of the Act apply to petitions for habeas corpus filed as original matters in this Court pursuant to 28 U.S.C. § 2241.

3. Whether application of the Act in this case is a suspension of the writ of habeas corpus in violation of Art. I, § 9, clause 2 of the Constitution.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995
No. 95-8836

ELLIS WAYNE FELKER, *Petitioner*,

v.

TONY TURPIN, Warden, *Respondent*.

INTEREST OF AMICI CURIAE

This case presents the first opportunity for the Court to review the federal habeas corpus reform provisions enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996 (the Act) and signed into law by the President on April 24, 1996. Amici are States which are required to defend their presumptively final and valid state court judgments against federal habeas corpus challenges. Because successive and duplicative federal review threatens the States' interests in the finality and enforcement of their criminal judgments, amici have a particular concern in the validity of the Act.

This brief is submitted in support of respondent by amici through their respective Attorneys General in accordance with Rule 37.4 of the Rules of the United States Supreme Court.

SUMMARY OF ARGUMENT

1. Article III, § 2, cl. 2 of the Constitution establishes that this Court's appellate jurisdiction is subject to "such exceptions" and "such regulations as the Congress shall make." This provision has long been understood as conferring upon Congress broad authority to restrict the Court's appellate jurisdiction. See *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868).

The Act requires that a petitioner seeking to file a successive habeas corpus petition in district court must first obtain permission from the circuit court of appeals. Section 106(b)(3)(E) of the Act, 28 U.S.C. § 2244(b)(3)(E), provides that grant or denial by the court of appeals of such an application may not be reviewed on a petition for writ of certioriari. That limitation on this Court's jurisdiction to review successive federal habeas corpus petitions is constitutional in light of *McCardle* and other cases interpreting the clear language of the Exceptions and Regulations Clause.

2. This Court's jurisdiction to issue a writ of habeas corpus inquiring into the legality of a state prisoner's custody is premised solely on statutory authority granted by Congress. The reforms embraced in the Act therefore govern habeas corpus petitions filed as original matters in this Court pursuant to 28 U.S.C. § 2241. The Act does not purport to divest the Supreme Court of its power to entertain such a petition but neither does it require the Court to depart from its historic reluctance to consider original petitions other than in exceptional circumstances.

When confronted with a second or successive petition raising a new claim under § 2244(b)(2), this Court should decline jurisdiction unless the petitioner has first sought permission, in the court of appeals, to file the petition in the district court. If the petitioner has

tried and failed, this Court should exercise its jurisdiction to review the alleged constitutional violation only in the rarest of cases, involving a truly persuasive showing of actual innocence of the underlying offense.

3. The Act's limitations on federal review of successive habeas corpus challenges to state criminal convictions do not violate the Suspension Clause in Art. I, § 9 of the Constitution. The Writ of Habeas Corpus referred to in the Suspension Clause is limited to prisoners in federal custody and only guarantees the right to habeas corpus review as it existed under the common law at the time the Constitution was ratified. Because the authority of the federal courts to review state criminal judgments on habeas corpus derives entirely from statute, limitations on such review by Congress in the Act violate no constitutional rights.

ARGUMENT

I.

SECTION 106(b)(3)(E) OF THE ACT FALLS WITHIN CONGRESS'S POWER TO REGULATE THE SUPREME COURT'S "APPELLATE JURISDICTION" UNDER THE "EXCEPTIONS AND REGULATIONS" CLAUSE.

Petitioner first contends that § 106(b)(3)(E) of the Act unconstitutionally restricts the appellate jurisdiction of this Court. Because the provision makes unreviewable the decision of a court of appeals to deny *or* grant authority to file a successive habeas application, petitioner claims Congress has exceeded its authority under the Constitution to restrict the jurisdiction of the United States Supreme Court. The clear language of the "Exceptions and Regulations" Clause of Article III,

section 2, the historical purpose of that provision, and the unwavering case law construing it, however, all indicate that Congress acted well within its authority in placing this restriction on the Court's authority.

A. The Plain Language Of The "Exceptions And Regulations" Clause Defeats Petitioner's Claim.

From the beginning, the United States Constitution granted Congress express authority to regulate and restrict the appellate jurisdiction of the Supreme Court. Article III, § 2 states:

> In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

U.S. Const. Art. III, § 2, cl. 2.

In providing that the Court's "appellate jurisdiction" is subject to "such exceptions" and "such regulations as the Congress shall make," the Constitution in simple terms grants the legislature authority to limit the Court's appellate jurisdiction. The "normal and ordinary" meaning, *United States v. Sprague*, 282 U.S. 716, 731-32 (1931), of "exceptions" and "regulations" indicates broad congressional power in this area.

When the Constitution was written, the authority to create "exceptions" conveyed the power to grant "an exclusion from a general rule or law," *Ash's Dictionary of the English Language* (1775), or meant "something taken out of a number of other things, and differing in some

particular," *Dyche's New General English Dictionary* (1781).[1] The authority to enact "regulations" likewise included the power "[t]o adjust by rule or method, to methodise, to dispose in order, to direct." *Perry's English Dictionary* (1805).

Confirming the broad authority that the Framers conveyed by using the word "regulations" is the manner in which the Framers employed it elsewhere in the Constitution. Aside from the "Exceptions and Regulations" Clause, the Constitution refers to Congress's authority over "regulation(s)" four times -- time, place and manner of Congressional elections, Art. I, § 4, cl. 1; land and naval forces, Art. I, § 8, cl. 14; prohibition against preference to any state in commerce, Art. I, § 9, cl. 6; return of slaves, Art. IV, § 2, cl. 3, and to the ability of Congress to "regulate" twice -- commerce with foreign nations and among states, Art. I, § 8, cl. 3; and coining money and fixing standard weights and measures, Art. I, § 8, cl. 5. Nothing about the Framers' employment of the term in these other provisions of the Constitution suggests any limitation on its accepted meaning. On the contrary, the term repeatedly conveys broad grants of lawmaking authority. *Cf.* Art. IV, § 2, cl. 3 (treating "Law" and "Regulations" synonymously). The power to "regulate" interstate commerce, for example, is among the most sweeping grants of authority in the Constitution. *Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159 (1985); *Wickard v. Filburn*, 317 U.S. 111 (1942); *Gibbons v. Ogden*, 22 U.S. 1 (1824).

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1. *See also Webster's American Dictionary of the English Language* (1828) ("The act of excepting, or excluding, from a number designated, or from a description . . . exclusion from what is comprehended in a general rule or proposition").

Other decisions from this Court confirm the broad authority the Framers granted to those given the power to "regulate" an area of law.

As a textual matter, then, it is difficult to see why the "Exceptions and Regulations" Clause means anything less than what it says. It grants broad congressional authority to "except" cases from the Court's appellate jurisdiction and otherwise to "regulate" that jurisdiction. Either grant or authority (and certainly the two together) permits Congress to cabin the appellate jurisdiction of the Court. And, in this instance, that authority clearly permits Congress to limit the Court's power to review the gatekeeping determination by the court of appeals as to whether a successive federal habeas petition may be filed in district court, a question that arises only after the Court has had at least three prior opportunities to review the petitioner's conviction and sentence.[2] Any argument to the contrary represents textual wishful thinking.

B. <u>The Framers' Understanding Of The "Exceptions And Regulations" Clause Mirrors Its Plain Meaning</u>

Besides being supported by the straightforward language of the "Exceptions and Regulations" Clause, Congress's power to enact § 106(b)(3)(E) is also supported by the Framer's understanding of the clause at the time it was ratified. Article III, to be sure, occupied far less of the ratification debate than other provisions of the Constitution. 2 *Records of the Federal Convention of*

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2. The petitioner potentially could seek certiorari review from the direct appeal of his judgment, from the denial of state collateral review, and from denial of federal habeas corpus relief.

1787 22, 46 (Max Farrand ed., 1911). But its provisions for a life-tenured judiciary with apparent authority to exercise judicial review did not go unnoticed. The Federalists and Anti-Federalists in particular debated whether the powers given the Third Branch had the potential to threaten democratic rule. *Federalists and Anti-Federalists: The Debate Over the Ratification of the Constitution* (John P. Kaminski and Richard Leffler, eds. 1989).

The Anti-Federalists, for example, argued that a life-tenured judiciary would not resist the temptation to aggrandize power over time. *See Brutus XI*, New York Journal, January 31, 1788. Attempting to deflate this claim, Alexander Hamilton pointed to Congress's ultimate authority to limit the Court's appellate jurisdiction under the "Exceptions and Regulations" Clause. He thus reassured his readers in Federalist No. 80 that "[i]f some partial inconveniences should appear to be connected with the incorporation of any of them into the plan, it ought to be recollected that the national legislature will have ample authority to make such exceptions, and to prescribe such regulations as will be calculated to obviate or remove these inconveniences." The Federalist, No. 80, at 541 (Hamilton) (J. Cooke ed., 1961).

Federalist Paper No. 81 is to the same effect. In emphasizing the limits on the appellate jurisdiction of the Court, Hamilton noted that "[i]n all other cases of federal cognizance, the original jurisdiction would appertain to the inferior tribunals; and the Supreme Court would have nothing more than appellate jurisdiction, 'with such exceptions and under such regulations as the Congress shall make.'" Hamilton then repeated the point, again attempting to defuse fears about the Court's powers by observing: "that of the partition of this authority a very small portion of original jurisdiction has been reserved to the Supreme Court, and

the rest consigned to the subordinate tribunals; that the Supreme Court will possess an appellate jurisdiction, both as to law and fact, in all cases referred to them, but subject to any exceptions and regulations which may be thought advisable." The Federalist No. 81, at 571 (Hamilton) (H. Dawson ed. 1863).

Future Chief Justice John Marshall similarly observed that "Congress is empowered to make exceptions to the appellate jurisdiction, as to law and fact, of the Supreme Court. These exceptions certainly go as far as the legislature may think proper for the interest and liberty of the people." 3 *Debates on the Federal Constitution* 560 (Jonathan Elliot 2d ed., 1888). The drafting history, individual views of the delegates about the provision, and its goal of defusing fears about the judiciary's power confirm that the Framers meant what they said when they gave Congress expansive power to limit the Court's appellate jurisdiction.

C. Case Law Construing The "Exceptions And Regulations" Clause Further Confirms The Broad Grant Of Authority Given To Congress.

Consistent with the plain language of the Constitution and the equally clear purpose of the Framers, this Court's decisions confirm Congress's broad authority to restrict the Court's appellate jurisdiction under the "Exceptions and Regulations" Clause.

Early decisions of the Court, written soon after the Constitution was ratified, indicate that the clause conveyed a broad grant of authority. In *Durousseau v. United States*, 10 U.S. (6 Cranch 307) 313 (1810), Chief Justice Marshall, a trend setter when it comes to judicial power, emphasized that it was the duty of Congress to spell out the Court's appellate jurisdiction. "[T]he appellate power of the Court," he stated, "shall not

extend to certain cases: [Congress] ha[s] described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative in the exercise of such appellate power as is not comprehended within it." *Id.* at 314. *See also Barry v. Mercein*, 46 U.S. (5 How.) 103, 119 (1847).

The well-accepted limitations on the Court's early jurisdiction over criminal cases illustrate this understanding. While Congress has continuously augmented the jurisdiction of the federal courts since the first Judiciary Act of 1789, "the First Judiciary Act is also significant for what it did not do." Rotunda & Nowak, *Treatise on Constitutional Law; Substance and Procedure* (2d Edition). "[I]t did not establish any general review in the Supreme Court of federal criminal cases." *Id.* "In fact, it was not until 1889 that there was generally established direct appeals in federal criminal cases." *Id. See United States v. Sanges*, 144 U.S. 310, 319 (1892); *see also United States v. Cross*, 145 U.S. 571 (1892); *Ex parte Bigelow*, 113 U.S. 328, 329 (1885). Notably, the Court never questioned this limitation on its jurisdiction (even with respect to capital cases), and indeed eventually placed its stamp of approval on the limitation. *McKane v. Dunston*, 153 U.S. 684 (1884) (holding that due process does not require an appeal in a criminal case).

Of course, in *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506 (1868), this Court clarified Congress's authority over the Supreme Court's appellate jurisdiction in a habeas corpus action. In *McCardle*, a Mississippi newspaper editor was imprisoned for certain statements contravening the Reconstruction Act. Following rumors that the Supreme Court would use McCardle's case to declare the Reconstruction Act unconstitutional, Congress repealed the legislation that had given the Court jurisdiction to hear the case. *See* Rehniquist, *The American*

Constitutional Experience; Remarks of the Chief Justice, 54 La. L.Rev. 1161 (1994).

The Court accepted Congress's restriction on its appellate jurisdiction and dismissed the petition for want of jurisdiction. Speaking through Justice Chase, the Court indicated:

> We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words . . . without jurisdiction the court cannot proceed at all in any case. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the case. And this is not less clear upon authority than upon principle.

Ex parte McCardle, 74 U.S. (7 Wall. 506) 513-514 (1868).

McCardle no doubt sets the bench mark concerning Congress's broad power to restrict the Court's appellate jurisdiction. But it does not stand alone. Other decisions and other justices have revisited the issue at different intervals in the Court's history. Justice Frankfurter, in his dissenting opinion in *National Insurance Co. v. Tidewater Co.*, 337 U.S. 582, 655 (1949), noted that "Congress need not establish inferior courts; Congress need not grant the full scope of jurisdiction which it is empowered to vest in them; Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while the case is sub judice." Justice Douglas, in his concurring opinion in *Flast v. Cohen*, 392 U.S. 83, 109 (1968), concluded that "[a]s respects our appellate

jurisdiction, Congress may largely fashion it as Congress desires by reason of the express provisions of Section 2, Art. III." More recently, in *South Carolina v. Regan*, 465 U.S. 367 (1984), Justice O'Connor explained in a concurring opinion that "Article III expressly empowers Congress to make 'Exceptions' and 'Regulations' to the appellate jurisdiction" of the Supreme Court. *See also United States v. United Mine Workers of America*, 330 U.S. 258, 351 (1947) (Rutledge J., dissenting) ("This Court . . . has repeatedly confirmed Congress' power to control . . . its own appellate jurisdiction . . . [t]hat power includes the power to deny jurisdiction as well as to confer it.").

D. <u>Petitioner's Contrary Arguments Are Mistaken</u>

In attacking the constitutionality of 28 U.S.C. § 2244(b)(3)(E), any reliance on *United States v. Klein*, 80 U.S. 128 (1872), the *only* Court decision ever to strike down a statute enacted under Article III, § 2, would be mistaken. *Klein* merely stands for the proposition that Congress may not use the "Exceptions and Regulations" Clause to dictate the *outcome* of a case. Even in so ruling, however, the Court reiterated the power of Congress to deny appellate jurisdiction in a particular class of cases:

> If [the Act] simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make "such exceptions from the appellate jurisdiction" as should seem to it expedient.
>
> But the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end . . .

> as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress.

Klein at 145-146.

Klein thus expressly rejected any assertion that Congress is constitutionally prohibited from enacting legislation that restricts the jurisdiction of the Court. Here, in stark contrast to the statute in *Klein*, the Act does no more than except from review a narrow class of cases that in almost all instances will have received at least three prior considerations by this Court. Certainly, the enactment of such an exception is well within the power of Congress under Article III, Section 2, and under *Klein*. It is worth emphasizing, moreover, that this neutral restriction cuts both ways: it prevents both the state *and* the habeas petitioner from seeking review of the court of appeals' decision.

Moreover, even assuming the Court wished to limit the applicability of the Exceptions Clause, nothing short of a nullification of the provision would render the Act at issue unconstitutional. The right to appeal a circuit court determination regarding the propriety of a successive habeas corpus petition hardly relates to an essential function of this Court indispensable to its role in resolving constitutional conflicts. The circuit court's ruling involves precisely the type of pure factual determination that Congress must be allowed to regulate if the exceptions clause is to have any meaning whatsoever.

Nor can petitioner claim that the Act is unconstitutional because it completely eliminates review of successive petitions. The prisoner still may file an original habeas petition before the Supreme Court and, if allowed to pursue further collateral relief in state

court, could potentially seek review before this Court. *See Felker v. Zant*, 502 U.S. 1064 (1992) (denial of petition for certiorari to review state habeas corpus denial).

II.

THE PROVISIONS OF THE ACT APPLY TO PETITIONS FOR HABEAS CORPUS FILED DIRECTLY IN THE SUPREME COURT UNDER 28 U.S.C. § 2241.

The United States Supreme Court's power to issue a writ of habeas corpus, inquiring into the legality of a prisoner's custody under a state court judgment, is not rooted in the Constitution; it is, instead, premised solely on statutory authority controlled by Congress. *Ex parte Bollman,* 8 U.S. (4 Cranch) 74, 98-99 (1807); see *Fay v. Noia,* 372 U.S. 391, 407 (1962); *Ex parte McCardle,* 74 U.S. (7 Wall.) 506, 513-14 (1868). Congress, in the Act, has altered that authority. The Act does not purport to divest the Supreme Court of power to entertain a petition as an original matter. But the many statutory reforms embraced in Title I of the Act profoundly change the way federal courts adjudicate state-prisoner habeas corpus petitions, whether filed as original matters in the Supreme Court or elsewhere in the federal court system pursuant to 28 U.S.C. §§ 2241 and 2254.[3]

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3. The order granting certiorari indicated that briefing on this question should be limited to the Act's effect on this Court's statutory jurisdiction under § 2241. Amici therefore do not address whether § 2241, insofar as it would authorize this Court to entertain a petition as an original matter, might operate as an unconstitutional expansion of this Court's original jurisdiction under

A. Statutory Background

Since 1948, §§ 2241-2255 of Title 28 of the United States Code generally have constituted the statutory framework of the habeas corpus jurisdiction of this Court and the lower federal courts. These consolidated sections comprised the Habeas Reform Act that replaced earlier habeas corpus laws as part of Congress' revision of the Judicial Code in 1948. See *United States v. Hayman*, 342 U.S. 205, 210-16 (1952); Longsdorf, "The Federal Habeas Corpus Acts, Original and Amended," 13 F.R.D. 407, 415-16.

Section 2241(a) empowers, without differentiation, "[1] the Supreme Court, [2] any justice thereof, [3] the district courts and [4] any circuit judge" to grant a writ of habeas corpus inquiring into the legality of the prisoner's detention. Section 2241(b) allows "the Supreme Court, any justice thereof, and any circuit judge" to decline to entertain an application and to transfer it to the lower district court instead. Section

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Article III. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175 (1803), held that Congress cannot expand the scope of this Court's original jurisdiction, and, in contrasting appellate authority, explained that "[t]he essential criterion of appellate jurisdiction [is] that it revises and corrects the proceedings in a cause already instituted, and does not create that cause." *Bollman*, in turn, characterized the power to grant a writ of habeas corpus, in a case in which the prisoner was in custody pursuant to the process of an inferior court, as appellate in nature. 8 U.S. at 98-99. In this brief, Amici do not take a position on whether *Marbury* or *Bollman* controls in determining this Court's jurisdiction to hear an original habeas corpus petition.

2241(c) sets out a general limitation of the habeas corpus power, mandating that the writ "shall not extend" to a prisoner unless he is subjected to a kind of "custody" specifically described in the statute.

In addition, § 2254 has provided further basic limitations upon the power of "the Supreme Court, a Justice thereof, a circuit judge, or a district court" to grant a habeas corpus application in the special context of a petition by a prisoner "in custody pursuant to the judgment of a State court." Since 1948, § 2254 has prohibited relief where the state prisoner has failed to exhaust available state court remedies; and, since 1966, it has mandated that, in many circumstances, state-court findings of fact are generally presumed correct in the federal proceedings.

As of April 24, 1996, Title I of the Act has changed the statutory authority of this Court, and the other federal courts, in additional ways. In large part, Title I specially addresses federal petitions for writs of habeas corpus filed by prisoners in custody under judgments of the state courts. Most significantly, Title I places time limitations on the filing and the course of litigation of such petitions, refocuses federal review on the reasonableness of the state courts' adjudication of the petitioners' federal claims, and accords state convictions new protections against belated and piecemeal attacks.

B. The Act Does Not Deprive This Court Of Power To Consider a Petition As An Original Matter.

The new provisions of the Act do not deprive the Supreme Court of its statutory authority to entertain a petition for writ of habeas corpus from a state prisoner in the first instance. The Act, first, does not directly amend § 2241(a) at all: it does not withhold the habeas corpus power from any of the enumerated judicial

officers or courts. Nor does it directly amend § 2241(c), which continues to restrict the writ from extending to persons who are not, at a minimum, "in custody" as described therein. Moreover, although the Act amends § 2254 significantly, it does not amend subdivision (a) in any way that deprives the Supreme Court, or any other federal court or judge previously empowered, of the authority to "entertain" a petition for writ of habeas corpus by a state prisoner.

C. In Considering An Original Petition, This Court Must Follow The Provisions Of The Act.

The Act amends §§ 2244 and 2254, and adds other statutory provisions that dramatically change the way this Court and other federal courts may treat habeas corpus petitions from state prisoners. For example, the Act sets up a limitations period for the filing of state-prisoner petitions, §101 [28 U.S.C. §2244(d)], allows federal courts to deny on the merits petitions of state prisoners who fail to exhaust state remedies, § 104 [§ 2254(b)(2)], sets out a new and deferential standard for federal review of state court decisions on federal questions and factual issues, *id.* [§2254(d),(e)(1)], prohibits discretionary evidentiary hearings for claims not developed in state court, *id.* [§2254(e)(2)], precludes relief on successive applications by state prisoners repeating old claims, § 106 [§2244(b)(1)], and imposes restrictions on both the filing and the adjudication of successive applications by state prisoners raising new claims, *id* [§ 2244(b)(2)]. Also, in capital cases from states with qualifying appointment-of-counsel practices, the Act imposes an additional set of requirements that in general serve to restrict review and limit the length of federal litigation. §107 [28 U.S.C. §§2261-2266].

These provisions, and Title I in general, apply to the adjudication of a petition filed as an original matter in the Supreme Court, as they apply to petitions filed in other federal courts. There is no reason to think otherwise. This Court has never suggested that its power to grant relief to a prisoner challenging the cause of his confinement under a state court judgment is broader under § 2241 than it is under § 2254, or that the § 2241 power is independent and unaffected by the other statutory provisions of the habeas corpus framework in the Judicial Code.

Nor has this Court indicated that its own jurisdiction over an original habeas corpus petition differs in kind from that exercised by other federal judges, or is in any way exempt from statutory limitations that apply to federal petitions in general. On the contrary, the Rules of this Court assume the applicability of the general statutory framework governing habeas corpus petitions. Rule 20.4(a) thus provides that an original petition "shall comply with the requirements of 28 U.S.C. §§ 2241 and 2242." And, "[i]f the relief sought is from the judgment of a state court, the petition shall set forth specifically how and wherein the petitioner has exhausted available state remedies in the state courts or otherwise comes within the provisions of 28 U.S.C. § 2254(b)."

D. Illustration: Amended § 2244(b) And Original Petitions Filed In The Supreme Court.

The case at bar, of course, illustrates one area where the new Act operates differently with respect to the district court and the courts of appeals than it does with respect to the Supreme Court. Section 106 of the Act, amending 28 U.S.C. § 2244, provides that a new claim presented under § 2254 by a state prisoner in a second or successive habeas corpus application shall be

dismissed unless the petitioner shows that the claim relies upon a retroactive new rule of law as defined narrowly in subdivision (b)(2)(A), or the factual predicate of the claim previously had been unavailable and constitutes proof of legal innocence as defined narrowly in (b)(2)(B)(i-ii).[4] Before the petitioner may file such a successive petition in the district court, however, he first must obtain permission by motion before a three-judge panel of the court of appeals. § 2244(3). Under § 2244(b)(3)(E), the court of appeals' ruling "shall not be the subject of a petition for rehearing or a petition for writ of certiorari."

Section 2244(b), by its terms, governs the ultimate filing of a successive petition in the district court. It does not expressly purport to govern the filing of such a petition as an original matter in the Supreme Court. But the Court's discretion to consider a petition as an original matter should not be exercised in a way that would defeat the effect of other restrictions the Act imposes upon habeas corpus.

Just as this Court retains the power to entertain a state-prisoner petition as an original matter, it also retains its broad discretion to decline to exercise jurisdiction over such original petitions. As stated in the Supreme Court Rules,

> To justify the granting of a writ of habeas corpus, the petitioner must show exceptional circumstances warranting the exercise of the Court's discretionary powers and must show

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4. In death penalty cases arising from states with qualifying procedures, an amendment of the petition after answer also must comport with restrictions that otherwise apply to second and successive petitions. 28 U.S.C. § 2266(b)(1)(B).

> that adequate relief cannot be obtained in any other form or from any other court. These writs are rarely granted.

Rule 20.2, Rules of Sup. Ct.; *see In re McDonald,* 489 U.S. 180, 184-5 (1989) (per curiam). In practice, this Court reportedly has adjudicated on the merits only four habeas corpus petitions as original matters during this century. Liebman, *Federal Habeas Corpus Practice & Procedure* (2d ed.) 1172 n.15, 1174 n.2; Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court,* 1962 Sup. Ct. Rev. 153.

There is certainly no reason for this Court to depart from its long-standing practice of ordinarily declining to exercise jurisdiction over original petitions. Indeed, the Court ought to proceed with special care so as not to frustrate the Act's legitimate new restrictions on successive petitions.

If a petitioner bringing a successive § 2244(b)(2) application has not first sought permission to file it in the appropriate district court, through a motion in the court of appeals under § 2244(b)(3)(A), he should be turned away at the threshold and should not be allowed as a matter of course to invoke the Supreme Court's habeas jurisdiction as an original matter. Declining to extend jurisdiction would comport with § 2242, which provides that, "if addressed to the Supreme Court . . . [the application] shall state the reasons for not making the application to the district court . . . ," and with Rule 20.4(a), which requires a demonstration "that adequate relief cannot be obtained in any other form or from any other court." *See Ex parte Abernathy,* 320 U.S. 219, 220 (1943).

If the petitioner in fact has properly sought, but has failed to obtain, permission to file from the court of appeals, and he also shows that he cannot obtain relief

"from any other court," then this Court may continue to determine as a matter of discretion whether the allegations warrant extending jurisdiction to the petition. In deciding whether to exercise its discretionary jurisdiction over such a petition, this Court well might consider the question that the petitioner had submitted in his motion to the court of appeals: whether there is a "prima facie showing that the application satisfies the requirements of" § 2244(b)(2). The Court should not, however, extend its jurisdiction on those grounds alone. To do so would replicate the very certiorari review of the appellate court's ruling that § 2244(b)(3)(E) specifically precludes.

Instead, the Court could consider whether the petitioner has made an "extraordinarily high threshold showing" of actual innocence, as described in *Herrera v. Collins,* 506 U.S. 390, 417 (1993). Although the role of "actual innocence" as a ground for relief under the Act might be open to debate -- new § 2244(b)(2)(B)(ii) itself seems to envision a showing of innocence only as a gateway for proof of "constitutional error," *see* 506 U.S. at 404-405 -- a threshold showing of actual innocence would be a most appropriate guideline for determining whether at least to extend discretionary jurisdiction to allow consideration of a successive petition otherwise permitted by the new Act. Requiring such a showing, moreover, would further serve to differentiate, in a meaningful way, the Supreme Court's discretionary decision to assert jurisdiction over the petition as an original matter from the kind of certiorari review of the court of appeals' decision on the motion to file that the Act precludes. Absent such a limitation, the Court might appear to be merely circumventing § 2244(b)(2).

If this Court actually were to choose to entertain a successive petition as an original matter under §§ 2241 and 2254 and to accord the case plenary consideration,

its ultimate adjudication of the petition would still be subject to the new Act and §§ 2241-2266. Thus, if the Court indeed were to allow the petition to be filed and considered as an original matter, it ultimately might have to deny relief under § 2244(b)(2) anyway. For, unless the Court determined on the merits that the new claim met the statute's successive-petition criteria, the statute would require that the petition "shall be dismissed." And, even if the petition were deemed to meet that criteria so as to avoid dismissal on Section 2244 grounds, relief in the end might be precluded anyway by operation of other provisions of the Act.

The need to comply with the both the new and the long-standing general restrictions on this Court's habeas corpus jurisdiction, and the need to account for the practical difficulties that arise when an appellate court undertakes an inquiry into facts, combine to militate strongly against exercises of the Court's discretionary power except in the rarest of instances. Assuming a truly persuasive showing of actual innocence might justify allowing a successive petition to be filed in this Court, for consideration of an alleged constitutional violation in light of the new Act's many reforms of habeas law, review on any lesser showing risks undermining the new restrictions on second bites at the apple contrary to the will of Congress.

III.

APPLICATION OF THE ACT IN THIS CASE DOES NOT VIOLATE ARTICLE I, § 9, CLAUSE 2 OF THE CONSTITUTION.

The limitations on federal habeas review for prisoners in state custody provided by the Act do not "suspend" habeas corpus review in violation of Article I, § 9, cl. 2 of the Constitution. Because that provision of the Constitution does not provide for habeas relief for prisoners in state custody, the limitations of the Act necessarily cannot be in violation of it. Moreover, even if the prohibition against suspending the writ of habeas corpus contained in Article I extended to prisoners held in state custody, that provision refers only to the common law writ of habeas corpus as it existed at the time the Constitution was ratified, not the type of post-conviction review now routinely exercised by the federal courts under the statutory authorization of Congress.

A. The Suspension Clause Does Not Apply To Prisoners In State Custody.

At the time of the ratification of the Constitution in 1789, it was clearly understood that Article I, § 9, cl. 2, did not guarantee a right to habeas corpus review for prisoners in state custody. The Framers of the Constitution were concerned about limiting the powers of the federal government. *See United States v. Cruikshank*, 92 U.S. (2 Otto) 542 (1875); *M'Culloch v. Maryland*, 17 U.S. (Wheat) 316 (1819). Section 9 of Article I, where the Suspension Clause is located, enumerates various limitations on federal government. It provides in clause 2:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Section 10 of Article I, the corresponding section containing limitations on state authority, does not provide a right to habeas corpus.

Perhaps more importantly, the actions of the First Congress, in providing for habeas corpus review, demonstrate that the writ referred to in the Suspension Clause was unequivocally limited to review of federal custody. *See* Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81-82 ("[W]rits of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify").

Commenting on the Judiciary Act of 1789 in *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807), Chief Justice Marshall made two important observations. First, he noted that there was no inherent power in the Constitution to award the writ of habeas corpus, but that such power "must be given by written law." *Id.* at 93-94. *See Ex parte Dorr*, 44 U.S. (3 How.) 103, 105 (1845) (federal courts' power to issue writ of habeas corpus does not exist unless conferred by statute). Second, he demonstrated that the clear understanding of the First Congress in providing the written law in support of the Suspension Clause was that it has no application to federal habeas review for prisoners in state custody.

> Acting under the immediate influence of this injunction [the Suspension Clause], they [the First Congress] must have felt, with peculiar force, the obligation of providing efficient

means by which this great constitutional privilege should receive life.

Ex parte Bollman, 8 U.S. (4 Cranch) at 95. By implication, the First Congress's provisions for the writ of habeas corpus were coextensive with the Constitutional writ and did not extend to persons in state custody. *Ex parte Dorr*, 44 U.S. (3 How.) at 105.[5]

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5. The Court or individual justices of the Court have occasionally alluded to the possibility that the Suspension Clause may guarantee a right of habeas corpus for prisoners in state custody. *See, e.g. Fay v. Noia*, 372 U.S. 391, 406 (1963) ("We need not pause to consider whether it was the Framers' understanding that congressional refusal to permit the federal courts to accord the writ its full common-law scope as we have described it might constitute an unconstitutional suspension of the privilege of the writ. There have been intimations of support for such a proposition in decisions of this Court.") (citations omitted); *Townsend v. Sain*, 372 U.S. 293, 311 (1963) ("We pointed out there that the historic conception of the writ, anchored in the ancient common law and in our Constitution as an efficacious and imperative remedy for detentions of fundamental illegality, has remained constant to the present day.") (*citing Noia*); *Jones v. Cunningham*, 371 U.S. 236, 238 (1963) ("The habeas corpus jurisdictional statute implements the constitutional command that the writ of habeas corpus be made available.") (*citing* the Suspension Clause). However, there has never been any analysis accompanying such references. On the other hand, discussion regarding the authority of federal courts to review state court convictions in federal habeas proceedings has routinely been premised on the statutes providing for such review. *See, e.g., Lonchar v. Thomas*,

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116 S.Ct. 1293, 130-1301 (1996) (Congress, not the Court, has the authority to establish a statute of limitations for habeas corpus cases); *Withrow v. Williams*, 507 U.S. 680, 715 (1993) (Scalia, J., concurring in part and dissenting in part) ("By statute, a federal habeas court has jurisdiction over any claim that a prisoner is 'in custody in violation of the Constitution' or laws of the United States." (citing 28 U.S.C. §§ 2241(c)(3), 2254(a), 2255)); *Kuhlman v. Wilson*, 477 U.S. 436, 446 (1986) (plurality opinion) (noting "Congress first authorized the federal courts to issue the writ on behalf of persons in state custody" in 1867); *Barefoot v. Estelle*, 463 U.S. 880, 892 n.3 (1983) (referencing Habeas Corpus Act of 1867 as "the First Act empowering federal courts to issue a writ of habeas corpus for persons in state custody"); *Swain v. Pressley*, 430 U.S. 372, 385 (1977) (Burger, C.J., dissenting) ("The fact is that in defining the scope of federal collateral remedies the Court has invariably engaged in statutory interpretation, construing what Congress has actually provided, rather than what it constitutionally must provide."); *Schneckloth v. Bustamonte*, 412 U.S. 218, 253 (1973) (Powell, J., concurring) ("Federal habeas review for state prisoners was not available until the passage of the Habeas Corpus Act of 1867"); *Brown v. Allen*, 344 U.S. 443, 460-61 (1953) ("Jurisdiction over applications for federal habeas corpus is controlled by statute."); Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U.Chi.L.Rev. 142, 170 (1970) ("It can scarcely be doubted that the writ protected by the suspension clause is the writ as known to the framers, not as Congress may have chosen to expand it or, more pertinently, as the Supreme Court has interpreted what Congress did." (footnote omitted)).

B. The Suspension Clause Guarantees Only The Right To Habeas Corpus As It Existed Under Common Law.

In addition to being limited to prisoners in federal custody, the writ referred to by the Suspension Clause is necessarily that existing under common law at the time the Constitution was ratified, which did not extend to questions of custody derived from a criminal conviction. *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201-02 (1830); *Ex parte Bollman*, 8 U.S. (4 Cranch) at 93-94 ("for the meaning of the term habeas corpus, resort may unquestionably be had to the common law"). In this regard, the Court looked to the English Habeas Corpus Act of 1679, which "enforces the common law." *Ex parte Watkins*, 28 U.S. (3 Pet.) at 202. Specifically exempted from benefiting from the English Act of 1679 were those who had been convicted. *Id.* Thus, conclusive of the determination of a petition for writ of habeas corpus was whether a court of general jurisdiction had entered judgment. *Id.* at 209. *See also McCleskey v. Zant*, 499 U.S. 467, 478 (1991).

Cases applying the 1789 habeas statute in the late nineteenth century demonstrate that the common-law understanding prevailed when Congress, in 1867, generally extended federal habeas jurisdiction to persons in state custody. *E.g., Ex parte Parks*, 93 U.S. (3 Otto) 18, 21-23 (1876) (federal custody); *see* Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 Notre Dame L. Rev. 1079, 1124-40 (1995) (discussing historical use of habeas corpus under Act of 1789 and Act of 1867); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 465-83 (1963) (same). As explained in *Ex parte Siebold*, 100 U.S. (10 Otto) 371, 375 (1879):

> The only ground on which this court, or any court, without some special statute authorizing it, will give relief on habeas corpus to a prisoner under conviction and sentence of another court is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void.

Even under the broader scope of the 1867 Act, moreover, the Court made clear that the existence of constitutional error during the course of judicial proceedings generally would not provide a basis for discharge on writ of habeas corpus. *E.g., Wood v. Brush*, 140 U.S. 278, 287-88 (1891) (African-American's claim that members of his race were unconstitutionally excluded from juries was not cognizable on habeas corpus because error would not render state conviction void or deprive court of jurisdiction); *Ex parte Bigelow*, 113 U.S. 328, 330-31 (1884) (claim that retrial would violate double jeopardy prohibition, if true, would not deprive court of jurisdiction or render proceedings void and, thus, habeas would not lie to prevent retrial). This is consistent with Congress's understanding, as reflected in its 1884 debates concerning the restoration of this Court's appellate jurisdiction, that the 1867 Act did not authorize the overturning of final judgments of state courts. *See* Forsythe, 70 Notre Dame L. Rev. at 1117-24; Bator, 76 Harv. L. Rev. at 477. The debate reveals that appellate jurisdiction was returned to the Court so that it could curtail expansive, and in Congress's view unauthorized, use of the writ by lower federal courts following the elimination of the Court's appellate jurisdiction in 1867. With the restoration of its appellate jurisdiction and until the early twentieth century, the Court continued to limit the writ to redressing void judgments or sentences or instances in which the Court

was without jurisdiction. *E.g., Henry v. Henkel*, 235 U.S. 219, 228-29 (1914); *Harkrader v. Wadley*, 172 U.S. 148, 163 (1898); *see* Bator, 76 Harv. L. Rev. at 478-83.

The genesis of the expansive view of "jurisdictional" issues for purposes of federal habeas review can be traced to *Frank v. Mangum*, 237 U.S. 309 (1915). There, the Court for the first time held that a trial in state court dominated by mob rule could be grounds for federal habeas relief, because such a trial would deprive the court of authority to issue a valid judgment. *Id.* at 327. Debate as to the rationale for this expansive view of federal habeas corpus has centered on whether unavailability of a corrective process was a threshold to consideration on federal habeas review, or whether unavailability of a state corrective process was the constitutional violation itself. *See Wright v. West*, 112 S.Ct. 2482, 2486-87 (1992); *id.* 112 S.Ct. at 2493 (O'Connor, J., concurring). It is not necessary to resolve this issue, however, because the inquiry into trial procedures is inconsistent with the analysis of *Ex parte Watkins*, which looked only to whether the convicting court had general jurisdiction over the criminal trial, not to procedures occurring at trial that could "deprive" the court of jurisdiction. 28 U.S. (3 Pet.) at 209. *Frank v. Mangum* and the cases following are the basis for the broad federal habeas review culminating in *Brown v. Allen*, 344 U.S. 443 (1953). While these cases defined the scope of Congress' statutory habeas remedy, it is *Ex parte Watkins* that defines the limits of the constitutional entitlement under the Suspension Clause.

In sum, there can be no unconstitutional suspension of the writ of habeas corpus where there is not a requirement that a writ of habeas corpus be provided.

C. Congress Permissibly Exercised Its Constitutional Authority In Limiting Availability Of The Writ For State Prisoners Who Previously Had An Opportunity To Litigate Federal Claims.

Even with the "limitations" on the availability of habeas corpus review for prisoners in state custody contained in the Act, the current availability of federal habeas corpus review is generous by constitutional standards. More particularly, the amendments to the habeas statutes limiting successive habeas applications were a proper exercise of Congress's authority. Judicial limitations on the exercise of federal habeas jurisdiction have, appropriately, been created "when Congress has not resolved the question." *Lonchar v. Thomas*, 116 S.Ct. 1293, 1298 (1996). Congress previously authorized dismissal of second or successive petitions in 28 U.S.C. § 2254 cases, and this Court properly established standards for the exercise of that discretion. *McCleskey v. Zant*, 499 U.S. 467, 496 (1991). Given these existing limitations, it is too late to plausibly argue that state prisoners are *entitled* to federal review of second petitions or that Congress is powerless under the Constitution to legislate in this regard. Additionally, the Court has long recognized that federal habeas review of state court detentions, particularly of final convictions, implicates weighty considerations of federalism and comity. *E.g., McCleskey v. Zant*, 499 U.S. at 490-92; *Wainwright v. Sykes*, 433 U.S. at 87-90; *Ex parte Royall*, 117 U.S. 241, 253 (1886). Congress' consideration of these factors when delineating the scope of the statutory habeas remedy is entirely appropriate. *Lonchar*, 116 S.Ct. at 1300-01.

A state prisoner filing a second federal habeas petition necessarily will have had one, and probably more than one, opportunity for full and fair litigation of his

constitutional claims: on direct appeal, on state collateral review, and in his first federal habeas petition. Thus, even aside from the textual and historical limitations on the scope of the writ guaranteed by the Constitution, limitations on the availability of habeas relief for a second or successive habeas petition would not constitute a suspension of the writ.

CONCLUSION

For the reasons stated above, Amici respectfully submit that the Court should dismiss the order granting certiorari and deny the petition for writ of habeas corpus.

Dated: May 16, 1996.

Respectfully submitted,

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(12)

No. 95-8836

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ELLIS WAYNE FELKER,
Petitioner,

v.

TONY TURPIN, WARDEN,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF *AMICI CURIAE* OF WASHINGTON LEGAL FOUNDATION AND JUSTICE FOR SURVIVING VICTIMS, INC. IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

(1) Whether Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996 (the Act), and in particular Section 106(b)(3)(E), 28 U.S.C. §2244(b)(3)(E), is an unconstitutional restriction of the jurisdiction of this Court.

(2) Whether and to what extent the provisions of Title I of the Act apply to petitions for habeas corpus filed as original matters in this Court pursuant to 28 U.S.C. §2241.

(3) Whether application of the Act in this case is a suspension of the writ of habeas corpus in violation of Art. I, §9, clause 2 of the Constitution.

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INTEREST OF *AMICI CURIAE*

Pursuant to Rule 37.3 of this Court, Washington Legal Foundation and Justice For Surviving Victims, Inc. respectfully submit this brief *amici curiae* in support of respondent. Written

consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center based in Washington, D.C. WLF participates in litigation and administrative proceedings affecting the broad public interest, and has a particular interest and expertise in criminal justice reform, the death penalty, and crime victims' rights. In that regard, WLF has appeared as *amicus curiae* in numerous cases before this Court. *See, e.g., McCleskey v. Kemp*, 107 S.Ct. 1756 (1987); *Payne v. Tennessee*, 111 S.Ct. 2597 (1991); *Davis v. United States*, 114 S.Ct. 2350 (1994).

Justice For Surviving Victims, Inc. (JSV) is a volunteer organization designed to elevate the status of victim participation in the American justice system. With more than 150,000 members and supporters in 22 states, JSV has been an active voice for crime victims. In Florida, the organizations was the primary sponsor of the Florida Victims' Rights Amendment to the Florida Constitution, adopted by the citizens of Florida in 1988. The amendment guarantees crime victims the right to be present and heard thought the justice process. More recently, JSV has been involved in efforts to secure the passage of a federal constitutional amendment to protect the rights of crime victims. Part of the amendment is designed to reduce unreasonable delays in capital cases. Many members of the organization have suffered first hand from the delays stemming from the current habeas corpus process for death penalty cases.

We believe our perspective will complement the brief of respondent and assist the Court in the proper resolution of this case.

SUMMARY OF ARGUMENT

The three questions presented in this case require the Court to resolve a single foundational issue: To what extent, if any, has the statutory federal habeas corpus remedy for state prisoners, codified at 28 U.S.C. §2254, become so fundamental to our modern-day conception of due process that it is constitutionally protected? We believe there is a constitutionally protected core of the statutory writ; however, Title I of the Act, and the specific provisions challenged in this case, are consistent with the due process concerns that habeas corpus is designed to vindicate.

In addressing the foundational issue that underlies this case, the Court should recognize that the criminal procedure revolution of the 1960s and 1970s has fundamentally altered the relationship between federal and state law, and between federal and state courts. Before the 1960s, federal constitutional law served as a vague backdrop for detailed state criminal procedure law. But after the revolution, federal constitutional criminal-procedure law under the Fourth, Fifth, and Sixth Amendments occupied the field, completely displacing pre-existing state law in those areas. Initially, state courts resisted the invasion of federal law and defended pre-existing state law; in that historical context, habeas corpus served as a vital tool to ensure the supremacy of federal law. Today, however, state courts accept the preeminence of federal constitutional criminal-procedure law. State courts no longer resist the application of federal law solely because it is federal; rather, they operate as partners with the federal courts in the interpretation and application of a unified body of criminal procedure law.

Given these fundamental changes, the Court should develop a new, coherent model for habeas corpus. In a single criminal justice system involving both state and federal courts,

habeas corpus should serve the two primary goals of that system -- namely, the protection of innocent defendants and the deterrence of state-court misconduct -- while minimizing costs to the state and to crime victims that stem from lack of finality. These two goals are already reflected in this Court's habeas corpus jurisprudence, and Title I of the Act is consistent with these goals. Because Title I of the Act preserves the statutory writ's ability to serve these goals, it is consistent with due process concerns and passes constitutional muster.

The specific parts of the Act challenged in this case do not intrude on the important role of the statutory writ of habeas corpus in protecting innocent defendants and deterring state-court misconduct. Under the precedents of this Court, Congress has broad powers to make exceptions to the Court's appellate jurisdiction. Even under a more limited view of Congress's powers, however, the Act does not intrude on the Court's constitutional responsibilities, and therefore does not violate Article III. The Act does not make any changes in 28 U.S.C. §2254 that are substantial enough to warrant a broader approach to the original habeas corpus jurisdiction under 28 U.S.C. §2241. Finally, with respect to the Suspension Clause, an interpretation of that proviso in light of its constitutional history would limit it to protecting the Great Writ as known by the Framers. But even under a broader reading of the Clause, the Act is constitutional because it does not run afoul of due process concerns.

ARGUMENT

I. THE QUESTIONS PRESENTED IN THIS CASE MAY REQUIRE THIS COURT TO DECIDE TO WHAT EXTENT, IF ANY, THE STATUTORY FEDERAL HABEAS CORPUS REMEDY FOR STATE PRISONERS, CODIFIED AT 28 U.S.C. §2254, HAS BECOME SO FUNDAMENTAL TO OUR CONCEPTION OF DUE PROCESS THAT CONGRESS MAY NOT CURTAIL IT.

This case presents three questions: (1) Whether Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996 (the Act) is an unconstitutional restriction of this Court's appellate jurisdiction; (2) whether Title I of the Act applies to original writs of habeas corpus under 28 U.S.C. §2241; and (3) whether Title I of the Act suspends the writ of habeas corpus in violation of Art. I, §9, clause 2 of the Constitution.

The answer to all three of these questions depends upon the Court's resolution of the following foundational issue: To what extent, if any, has the statutory federal habeas corpus remedy for state prisoners that is codified at 28 U.S.C. §2254 -- a remedy that was wholly unknown to the Framers -- become so fundamental to our modern-day conception of due process that Congress is prohibited by the Constitution from curtailing the application and scope of that remedy? The appropriate resolution of this issue compels the conclusion that the relevant parts of the Act do not exceed Congress's constitutional authority. Petitioner's requested relief should therefore be denied by this Court.

A brief examination of the Act and the three questions presented will reveal why it may be necessary in this case for the Court to determine the proper relationship between the statutory

writ of federal habeas corpus for state prisoners and fundamental modern-day conceptions of due process.[1]

Title I of the Act, whose relevant sections amend 28 U.S.C. §§2244, 2253, and 2254, along with Rule 22 of the Federal Rules of Appellate Procedure, alters the statutory habeas corpus remedy by, *inter alia*, restricting -- in a limited sense -- this Court's appellate jurisdiction. In amended 28 U.S.C. §2244(b)(3)(E), in particular, Congress placed new limits on second or successive applications for the statutory writ of habeas corpus: "The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. §2244(b)(3)(E).

By its terms, section 2244(b)(3)(E) restricts this Court's appellate jurisdiction. A state prisoner who files a second or successive habeas petition must obtain from a "three judge panel of the court of appeals," *id.* at §2244(b)(3)(B), "an order authorizing the district court to consider [it]," *id.* at §2244(b)(3)(A). Whether granted or denied, a petitioner's motion for such an order "shall not be appealable and shall not be the subject of a petition . . . for a writ of certiorari," *id.* at §2244(b)(3)(E). In plain language, the Act takes away from the Court the jurisdiction to hear, on appeal or by means of a writ of certiorari, claims contained in a second or successive federal habeas corpus application, unless a three-judge panel of the court of appeals has previously authorized the district court to consider those claims.

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1 Consideration of the modern constitutional role of the statutory writ will also be important in resolving various challenges to other parts of the Act that will surely be raised, in the near future, in cases involving non-successive federal habeas corpus petitions.

The first question presented asks whether Congress's limited restriction of the Court's appellate jurisdiction in successive-petition habeas cases, pursuant to Title I of the Act, violates the Constitution. One relatively simple answer to this question is provided in a series of Reconstruction-era decisions of this Court. The Constitution grants the Supreme Court appellate jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make." U.S. Const. art. III, §2. As originally understood, this provision gives Congress broad latitude to regulate and make exceptions to this Court's appellate jurisdiction. *See* THE FEDERALIST NO. 80, at 541 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). This Court's teachings have defined how far that latitude extends. Congress may strip the Court of jurisdiction, even in a pending case. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514-15 (1868); *but see Glidden Co. v. Zdanok*, 370 U.S. 530, 605 n. 11 (Douglas, J., dissenting). However, the Court will narrowly construe any statute purporting to restrict its appellate jurisdiction, *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 106 (1869), and Congress may not require the Court to decide in favor of a particular category of litigants or dismiss the case, *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146-47 (1871).

Under these precedents, the first question presented is answered easily. Under any plausible construction of the Act, section 2244(b)(3)(E) imposes restrictions on this Court's appellate jurisdiction. Unlike the statute in *Klein*, however, section 2244(b)(3)(E) applies without regard to which party was victorious in the court below. Assuming that *McCardle* and *Klein* still define the outer boundary of Congress's authority to restrict the Court's appellate jurisdiction, the Act is constitutionally valid because it does not extend beyond that boundary.

If, on the other hand, the Court does not choose simply to adhere to the 19th-century precedents of *McCardle* and *Klein*

in answering the first question presented, what is the best approach to defining the scope of Congress's authority to strip the Court of appellate jurisdiction? A number of theories have been advanced in support of various kinds of limits on Congress's appellate-jurisdiction-stripping authority. *See, e.g.*, Amar, "A Neo-Federalist view of Article III: Separating the Two Tiers of Federal Jurisdiction," 65 B.U. L. Rev. 205, 229-230 (1985); Bator, "Congressional Power Over the Jurisdiction of the Federal Courts," 27 Vill. L. Rev. 1030, 1031 (1982); Redish, "Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination," 27 Vill. L. Rev. 900, 902 (1982); Wechsler, "The Courts and the Constitution," 65 Colum. L. Rev. 1001 (1965). Of those who have argued for recognizing substantial limits on such Congressional power, however, the most influential theory -- by far -- is the one articulated by Professor Henry M. Hart, Jr. *See* Hart, "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic," 66 Harv. L. Rev. 1362 (1953). Under Hart's theory, Congress may make exceptions to this Court's appellate jurisdiction so long as those exceptions do not prevent the Court from fulfilling its core constitutional functions under Article III. In other words, "the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan." *See id.*, at 1365.

But in order to apply Professor Hart's theory (or any other theory similarly premised on the structure of Article III), this Court would first be required to define the extent, if any, to which the statutory writ of federal habeas corpus for state prisoners has become -- in the modern era -- indispensable to the Court's "essential role" in the "constitutional plan." Only then can it be determined whether the limited restrictions on the Court's appellate jurisdiction contained in the Act so infringe on the Court's core Article III responsibilities as to run afoul of the Constitution. The answer to this inquiry, in turn, depends on the

extent to which the statutory writ of habeas corpus is necessary to protect those interests that are at the core of modern-day notions of due process.

In a similar vein, the second question presented requires the Court to address the relationship between the statutory writ of federal habeas corpus for state prisoners and fundamental due process concerns. This Court has, over the years, developed a sensible approach for reconciling the scope of 28 U.S.C. §2254 (the statutory writ applicable to state prisoners) with that of 28 U.S.C. §2241, which confers on this Court and its Members original jurisdiction to issue writs of habeas corpus. That approach has severely restricted the original habeas corpus jurisdiction under section 2241 to those rare situations in which the usual procedure, as defined by section 2254, cannot be relied upon to protect the fundamental liberty interests that are at the core of due process. *See* U.S. Supreme Court Rule 20.4(a) ("[t]o justify [the Court's] granting of a writ of habeas corpus, [petitioners must show] that exceptional circumstances warrant the exercise of the Court's discretionary powers and that adequate relief cannot be obtained in any other form or from any other court"); J. LIEBMAN & R. HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 40.3 (2d ed. 1994) ("However the original habeas corpus jurisdiction of Supreme Court Justices and the Supreme Court itself is defined, that jurisdiction is virtually never exercised.").

In light of the Court's historic approach to habeas petitions filed under section 2241, the second question presented in this case might be better phrased as follows: Do the provisions of Title I of the Act so significantly alter the application and scope of 28 U.S.C. §2254 that this Court should correspondingly modify its historic approach to the original habeas corpus jurisdiction pursuant to 28 U.S.C. §2241? To put it another way, petitioner Felker -- who, prior to the enactment of the Act, surely

would have been unsuccessful in petitioning this Court for an original writ of habeas corpus under section 2241 -- urges, in effect, that the impact of the Act on successive petitions under section 2254 should compel the Court to create a broader scope for section 2241. If this is indeed the essence of petitioner's argument, then the answer to it depends on the Court's resolution of the same foundational issue that may underlie the first question presented -- namely, to what extent, if any, the statutory writ under 28 U.S.C. §2254 has become an essential component of due process.

Finally, the third question presented may also implicate the same foundational issue. According to petitioner, section 2244(b)(3)(E) also violates the Suspension Clause: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, §9, cl. 2. As with the first question presented, there may be a relatively simple response to petitioner's constitutional claim: As a matter of constitutional history, the Suspension Clause simply cannot be extended to the statutory writ applicable to state prisoners, which did not exist at the time of the Framing but was first enacted by Congress in 1867. *See Sanders v. United States*, 373 U.S. 1, 29 (1963) (Harlan, J., dissenting); *Swain v. Pressley*, 430 U.S. 372, 384-85 (1977) (Burger, C.J., concurring); Fallon & Meltzer, "New Law, Non-Retroactivity and Constitutional Remedies," 104 Harv. L. Rev. 1731, 1779 n. 244 (1991); Friendly, "Is Innocence Irrelevant? Collateral Attack on Criminal Judgments," 38 U. Chi. L. Rev. 142, 170 (1978) ("It can scarcely be doubted that the writ protected by the suspension clause is the writ as know to the framers, not as Congress may have chosen to expand it or, more pertinently, as the Supreme Court has interpreted what Congress did."); *but see Fay v. Noia*, 372 U.S. 391, 406 (1963) (referring to "intimations of support" for broader interpretation of Suspension Clause in some Court decisions). Indeed, the Framers

considered and rejected proposals to extend the Great Writ of the Magna Carta to both federal and state prisoners, *see* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 438 (Max Farrand ed., 1911), and the First Congress rejected the extension of federal habeas to state prisoners, *see* First Judiciary Act, ch. 20, § 14, 1 Stat. 73, 81-82 (1789) (limiting federal habeas to federal prisoners). Thus, according to this view, because section 2244(b)(3)(E) amends only the scope of the statutory writ, and not the Great Writ as it existed at the time of the Framing, it follows that section 2244(b)(3)(E) does not offend the Suspension Clause.

If, however, the Court chooses not to give the Suspension Clause a construction limited by its constitutional history, what is the alternative? Once again, in order to determine the modern-day meaning and application of the Suspension Clause, the Court would first be required to delineate the modern-day due process dimensions of the statutory writ of habeas corpus for state prisoners as defined by 28 U.S.C. §2254. If the Suspension Clause has evolved in meaning since the time it was enacted, or if it (alternatively) has taken on a new meaning as a result of the subsequent enactment of the Fourteenth Amendment (*see* Steiker, "Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners," 92 Mich. L. Rev. 862 (1994)), then the most appropriate way to determine its new meaning is in light of the fundamental concerns of due process. The core value underlying the Suspension Clause is the protection of federal citizens from arbitrary deprivations of liberty. To the extent that our definition of "federal citizenship" has evolved to include protection against arbitrary deprivations of liberty at the hands of state officials, *see* U.S. Const., amend. XIV, then the Suspension Clause may ensure that Congress, today, cannot entirely snuff out the statutory writ of habeas corpus.

In short, regardless of the particular form of the three questions presented in this case, the challenges to Title I of the Act which they express may well reduce to a single issue: Has some part of the statutory federal habeas corpus remedy for state prisoners, as contained in 28 U.S.C. §2254, become so fundamental to our modern-day notion of due process that Congress may not now curtail it? In order to address that issue, the Court must develop a coherent model of federal habeas corpus law, including a statement of the fundamental purposes served by the statutory writ. And in developing that model, it is important to decide what historical premises will serve as its foundation.

II. A SOUND MODEL OF HABEAS CORPUS SHOULD TAKE AS ITS POINT OF REFERENCE THE FACT THAT THE COURT'S CRIMINAL PROCEDURE DECISIONS HAVE REVOLUTIONIZED THE APPLICATION OF FEDERAL LAW BY STATE COURTS IN CRIMINAL CASES.

The statutory writ of federal habeas corpus under 28 U.S.C. §2254 has long been viewed as providing a federal-court remedy for violations of the federal constitutional rights of state criminal defendants. Although correct to a certain extent, this characterization of the statutory writ ignores -- even worse, obscures -- how much the criminal procedure revolution of the 1960s and 1970s altered the way that federal constitutional law is applied by state courts in state criminal cases.

In thinking about the proper modern-day role of habeas corpus in our federal system, concerns about the respective institutional roles of federal and state courts are much less relevant today than in the 1960s, and have been largely supplanted by the traditional concerns of criminal law -- the protection of innocent defendants and the deterrence of state-court misconduct in the interpretation and application of federal law.

As a result of the criminal procedure revolution, federal and state courts are no longer institutional adversaries defending their respective bodies of criminal procedure law. Instead, they are institutional partners in the interpretation and application of the same body of criminal procedure law -- namely, federal constitutional criminal-procedure law. This crucial historical shift, which has often been overlooked by courts and commentators alike, should serve as the starting point for the development of a coherent habeas corpus model.[2]

Before the 1960s, state criminal trials proceeded according to detailed rules of criminal procedure that were largely defined and applied by state officials. Federal law -- primarily the Due Process Clause of the Fourteenth Amendment -- operated only as a limit on how little protection a state could afford criminal defendants. Such limits left state legislatures and courts with ample room to develop and operate criminal procedure largely as they wished.

Then the world turned upside down. In the Fourth, Fifth, and Sixth Amendments, this Court found specific procedural guarantees regarding search-and-seizure, police interrogation, the right to counsel, jury selection, double jeopardy, and other matters. By incorporating all but a few of these guarantees into the Due Process Clause and thereby applying them to the States, this Court effectively replaced state criminal procedure with federal law. *See, e.g., Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring states to give warnings, based on the Fifth Amendment, before interrogating suspects in custody); *Malloy v. Hogan*, 378 U.S. 1 (1964) (incorporating the Fifth Amendment privilege against self-incrimination); *Gideon v. Wainwright*, 372

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2 For a more fully developed version of the analysis presented in this section, see Joseph L. Hoffmann & William J. Stuntz, "Habeas After the Revolution," 1993 Sup. Ct. Rev. 65.

U.S. 335 (1963) (incorporating the Sixth Amendment right to counsel); *Mapp v. Ohio*, 367 U.S. 643 (1961) (incorporating the Fourth Amendment exclusionary rule).

Prior to this revolution in criminal procedure law, the prevailing approach by courts and commentators was to lump habeas corpus into the same category of "federal courts" law with Section 1983 litigation, the immunity of state governments and officials, the availability of federal injunctions against state criminal proceedings, and Eleventh Amendment doctrine. This approach to habeas corpus was driven, in common with its categorical companions, by the ideological struggle between theoretical approaches that Professor Richard Fallon aptly labeled "Federalism" and "Nationalism." *See* Fallon, "Ideologies of Federal Courts Law," 74 Va. L. Rev. 1141 (1988). Although few cases have been decided by this Court solely in terms of these Federalist and Nationalist approaches, they have served as rhetorical structures or as ideal models of the way the world of federal jurisdiction should work. *See id* at 1145-50.[3]

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3 According to Professor Fallon, Federalists tend to think of the Constitution as a document that preserves a certain balance between federal and state authority by carefully limiting federal power. They consider state and federal courts equally competent and equally dedicated to the vindication of federal rights; in other words, they believe in the parity of state and federal courts. They tend to exalt comity and deference to state court decisions and to discount the value of federal supremacy and the application of federal law by federal courts. The Framing of the Constitution provides the historical anchor for this ideology. *See id.* at 1151-57.

Nationalists, on the other hand, tend to think of the Constitution as a document centered on the Fourteenth Amendment's assurance that to every citizen of the Republic belongs certain fundamental rights, which federal courts should guard from state infringement. Nationalists believe that federal courts are more trustworthy than state courts, particularly when state courts are called on to vindicate federal rights. For this reason, they generally insist that federal interests require federal enforcement; they believe in the disparity of state and federal courts. Comity and deference to state court decisions matter less, in their

With only rare exceptions, judicial opinions and scholarly commentary on the role of habeas corpus in the federal system have remained enmeshed in the ideological debate between Federalism and Nationalism. *See Wright v. West*, 505 U.S. 277 (1992); *Coleman v. Thompson*, 504 U.S. 992 (1991); *Teague v. Lane*, 489 U.S. 288 (1989); *Stone v. Powell*, 428 U.S. 465 (1976); *Fay v. Noia*, 372 U.S. 391 (1963); *Brown v. Allen*, 344 U.S. 443 (1953); Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 Harv. L.Rev. 441 (1963); Neuborne, "The Myth of Parity," 90 Harv. L. Rev. 1105 (1977); Peller, "In Defense of Federal Habeas Corpus Relitigation," 16 Harv. C.R.-C.L. L. Rev. 579 (1982).[4]

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view, than the Supremacy Clause and the value of allowing federal courts to apply federal law. Nationalists receive historical support for their view from the Reconstruction Era following the Civil War. *See id.* at 1158-64.

4 Even the popular arguments from congressional intent and habeas history, which initially appear to depart from this pattern, are actually disguised versions of the same debate between Federalism and Nationalism. The argument from congressional intent attempts to locate the role of habeas in congressional pronouncements running back to 1867, when the first great modern habeas statute was enacted. But this argument must eventually confront the fact that neither the 1867 Congress nor any of the Congresses that have amended the statute -- prior to the Act at issue in this case -- have directly addressed the key issues in habeas law: the substantive scope of the habeas remedy, or the proper rules of procedural default, harmless error, and retroactivity. Given such scanty guidance from Congress, the argument from congressional intent tends to fall back on parsing opinions of this Court thought to provide the relevant backdrop to congressional action. *See, e.g., Kenney v.Tamayo-Reyes*, 504 U.S. 1, 14-19 (1992) (O'Connor, J., dissenting). Such opinions, in turn, raise precisely the same litany of Federalist and Nationalist concerns that the argument from congressional intent initially appeared to avoid.

The argument from history, which looks more broadly to the traditions of habeas corpus law since 1867, attempts to identify in the enactments of Congress, the decisions of this Court, or both, a consistent ideological pattern that can be invoked to decide a particular case. *See, e.g., Wright v. West*, 505 U.S. 277, 285-295 (1992) (Thomas, J., plurality opinion); *id.* at 297-306 (O'Connor, J., concurring in the judgment); Liebman, "Apocalypse Next Time?

After the criminal procedure revolution, however, it no longer makes sense to think about habeas corpus primarily in terms of the ideological struggle between Federalism and Nationalism. The historical struggle between federal and state law, which still exists in many areas of constitutional law today, has been nearly eliminated in the realm of criminal procedure. Through the process of incorporation, federal constitutional law under the Fourth, Fifth, and Sixth Amendments has occupied the field -- completely extinguishing the pre-existing state criminal procedure law. Today, wherever federal constitutional criminal-procedure law exists, there is no longer any possibility of a direct conflict between that federal constitutional law and state criminal procedure law.

As a corollary, state courts have come to accept the preeminence of federal constitutional law in governing how state criminal investigations and trials should proceed. Because of the criminal process revolution, one of the foundational premises for the law of federal courts -- that federal constitutional law is foreign to state courts -- no longer holds true in the area of federal constitutional criminal-procedure law. If not indigenous, federal criminal procedure has at least become an accepted and familiar part of the legal landscape for state courts in nearly every criminal proceeding.

The Anachronistic Attack on Habeas Corpus/Direct Review Parity," 92 Colum. L. Rev. 1997 (1992). This historical approach runs into a serious obstacle, as well. As with every federal doctrine touching on criminal procedure, the role of habeas corpus was transformed by the criminal process revolution. For this reason, it is most likely pointless to draw elaborate lessons from cases prior to the 1960s. Without a more compelling foundation, the argument from history winds up in the same place as the argument from congressional intent: the ideological debate between Federalism and Nationalism.

This revolution in the law of criminal procedure has fundamentally changed the central role of habeas corpus in the federal system. Before the successful completion of the revolution, state courts often defied (both openly and surreptitiously) this Court's criminal procedure decisions. More importantly, this defiance occurred precisely because these decisions were based on federal law, and sought to supplant long-standing and familiar (to the state courts) bodies of state law. In this historical context, habeas corpus served as a powerful tool to ensure the ultimate supremacy of these newly articulated federal constitutional rights. By permitting federal courts to engage in collateral review of state court decisions in criminal cases, habeas corpus gave federal courts a vehicle for ensuring that state courts would accept this Court's decisions -- no matter how unpopular this invasion of federal law might have been.

Today, however, all serious debate in the area of criminal procedure law focuses on the content of the governing federal law, not on the propriety of such federal law being applied in state criminal cases. Today, whenever state courts disagree with the result or the reasoning of a Fourth, Fifth, or Sixth Amendment decision of this Court, it is not (as in the 1960s) because that decision is based on federal law rather than state law; instead, it is because there is an honest disagreement about the appropriate content of the federal law, which everyone -- state court and federal court alike -- agrees is the governing law. Indeed, many states now interpret their own constitutions as providing protections for criminal defendants that extend beyond federal law. *See generally* B. LATZER, STATE CONSTITUTIONS AND CRIMINAL JUSTICE (1991).

This wholesale transformation in the relationship between state law and federal law, and between state courts and federal courts, provides the Court with a sound basis for developing a new and coherent model of habeas corpus law. This new model

should take into account the fundamental changes wrought by the criminal procedure revolution. To the extent that federal constitutional criminal-procedure law has prevailed, and has completely replaced pre-existing state criminal procedure law, habeas corpus is no longer needed as a weapon in the war to ensure the supremacy of federal law over state law. Today, state courts no longer resist the application of federal constitutional law in criminal proceedings simply because it is federal law. Given this change, we should ask the following question: What role should the statutory writ of habeas corpus play in our federal system today?

III. HABEAS CORPUS SHOULD SERVE TO PROTECT INNOCENT DEFENDANTS AND TO DETER STATE-COURT MISCONDUCT; TITLE I OF THE ACT IS CONSISTENT WITH THIS MODEL OF HABEAS CORPUS, WHICH REFLECTS THE FUNDAMENTAL CHANGES WROUGHT BY THE CRIMINAL PROCEDURE REVOLUTION.

In the previous section we explained how the criminal procedure revolution has rendered the old "federal courts" model of habeas corpus law obsolete. In this section we will describe an alternative model of habeas corpus law, reflecting the fundamental changes wrought by the criminal procedure revolution of the 1960s and 1970s, that is based on modern-day conceptions of due process. We will also demonstrate how Title I of the Act is consistent with this new model of habeas corpus.

After the criminal procedure revolution, which rendered the traditional debate between Federalists and Nationalists largely irrelevant to habeas corpus law, what core values should be served by the federal statutory writ of habeas corpus for state prisoners? A proper analysis should begin by recognizing the costs and benefits of the habeas corpus remedy -- not in the old-

fashioned institutional terms of "federalism" and "comity," but in the context of a single, unified, federal-state criminal justice system. On one side of the ledger, the cost of habeas corpus is the suspension of a criminal judgment's finality pending the outcome of habeas corpus review. Habeas corpus also imposes substantial financial costs in the form of time and energy spent by courts, prosecutors, and (oftentimes) state-paid defense counsel. The State should not have to spend this time and money unnecessarily.

Equally important, habeas corpus remedies extract a significant toll in human suffering. In capital cases, for example, surviving victims' families must await the final conclusion of habeas review before seeing the case brought to a close and the penalty imposed. Protecting victims and surviving victims is an important value that must be considered in any evaluation of habeas corpus remedies. *Cf. Morris v. Slappy*, 461 U.S. 1, 14 (1983)("In the administration of criminal justice, courts may not ignore the concerns of victims."); *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)("'Justice, though due to the accused, is due to the accuser also.'" (*quoting Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934)(Cardozo, J.) The psychological costs incurred by victims of crime, their families, and the law-abiding public generally -- who view "justice delayed" as "justice denied" -- must never be underestimated. Finally, delays dilute the deterrence dimension of swift punishment.

The benefits of the habeas corpus remedy, on the other hand, should be assessed in light of the primary goals of the criminal justice system. There are two such primary goals. First, only those defendants who are guilty should be convicted and punished. Second, all defendants, whether innocent or guilty, should be treated in a procedurally fair manner -- as defined, today, largely by federal constitutional criminal procedure law.

These two primary goals of the criminal justice system can serve as the basis for developing a coherent model of federal habeas corpus for state prisoners. In short, there are two good reasons to preserve a role, in our modern-day criminal justice system, for the federal statutory writ of habeas corpus for state prisoners -- (1) the statutory writ can serve as a crucial "safety valve" for the protection of innocent defendants in state criminal cases, and (2) the writ can also serve to ensure that state courts "toe the constitutional mark," *see Mackey v. United States*, 401 U.S. 667, 687 (1971) (Harlan, J., concurring in the judgment and dissenting), thereby helping to guarantee that all defendants in state criminal cases are treated in a procedurally fair manner (as defined by federal constitutional law).

In simple terms, our proposed new model of habeas corpus law operates on two tracks. The first track offers habeas corpus relief to any state prisoner who can make a sufficiently strong showing of innocence combined with a claim of constitutional violation. The second track permits a state prisoner who lacks a sufficient claim of innocence to obtain habeas corpus relief only if he can show that the state court acted unreasonably, thereby failing to "toe the constitutional mark" and warranting the application of a habeas corpus remedy designed to deter such misconduct.

Both of these goals, of course, lie at the core of our modern-day conception of due process. Preventing the punishment of innocent defendants and ensuring that state courts "toe the constitutional mark" are central to what this Court has found to be "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.). Therefore, to the extent that the three questions presented in this case may depend on defining the constitutionally protected scope of the statutory writ, a coherent model of federal habeas corpus for state prisoners based on these two goals not only makes good

sense, but also passes constitutional muster under Article III, the Suspension Clause of Article I, and the Due Process Clause.

Indeed, prior to the enactment of the Act, these two goals were already substantially reflected in the Court's modern-day habeas corpus jurisprudence. With respect to the protection of innocent defendants, the Court created an exception to certain procedural habeas corpus restrictions for situations involving a "fundamental miscarriage of justice," defined in terms of factual innocence. *See, e.g., Murray v. Carrier*, 477 U.S. 478, 495-96 (1986) (creating "fundamental miscarriage of justice" exception to procedural default doctrine). In addition, a majority of the Court acknowledged, at least in theory, the viability of a sufficiently strong innocence claim on habeas corpus even in the absence of an accompanying procedural constitutional violation. *See Herrera v. Collins*, 113 S. Ct. 853 (1993). With respect to ensuring procedural fairness, the Court recognized that the goal can be served adequately by limiting habeas corpus relief to cases where the state court misinterpreted clearly established federal law. *See, e.g., Teague v. Lane*, 489 U.S. 288 (1989) (declaring new retroactivity doctrine that generally precludes retroactive application of "new law" to reverse state convictions that were valid under the prior law). Where the federal law was unclear at the time the state court acted, there is no basis for concluding that the state court requires deterrence, and therefore no good reason to grant habeas corpus relief.

Title I of the Act is remarkably consistent with the two-track model of habeas law we have proposed. For instance, the Act's amendments to 28 U.S.C. §2254 contain the following language:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted

with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> 2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding ....

28 U.S.C. §§2254(d)(1) and (2).

These subsections directly address the deterrence concerns that our model identifies as one of the two primary goals of habeas corpus. Subsection (d)(1) addresses pure questions of federal law, and limits the habeas corpus remedy to cases where the petitioner can show [1] that the state court decision ran counter to [2] clearly established federal law [3] as determined by this Court. Subsection (d)(1) also addresses mixed questions of law and fact; with respect to such mixed questions, relief can be granted only if the state court decision "involved an unreasonable application" of clearly established federal law as determined by this Court. Both of these clauses of subsection (d)(1) limit habeas corpus relief to cases involving a sufficiently high degree of conflict between the state decision and "clearly established" federal law as determined by this Court -- precisely the kinds of cases in which state courts need to receive a deterrence message. Subsection (d)(2) has much the same effect on

claims based on questions of pure fact; it requires the petitioner to show that the state court's factual determination was [1] unreasonable [2] in light of the evidence presented in the state court proceeding.

Taken together, subsections (d)(1) and (d)(2) cover every kind of case in which a state court might misconceive or (in the worst case) attempt to circumvent federal law: pure questions of law, pure questions of fact, and mixed questions involving the application of law to fact. In all three situations, under the deterrence track of our proposed model, habeas corpus relief should be granted only if the state court decision was unreasonable at the time it was made. The Act, in the aforementioned subsections (d)(1) and (d)(2), is consistent with this approach.[5]

The new standards of review prescribed by the Act manage to pursue the appropriate habeas corpus goal of deterrence without running afoul of the "deference or superiority" dichotomy characteristic of the traditional "federal courts" analysis -- under which courts and commentators engaged in fruitless debate over the so-called "parity" of state and federal

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5 Under our proposed model, with the vindication of innocence claims moved to a separate track, deterrence is not justified merely to minimize the number of good-faith errors that the State might make in its own favor. The deterrent effect of habeas corpus review on police and prosecutors is severely attenuated by the delay between their conduct and the subsequent grant of habeas relief. State courts feel the sting from habeas corpus review more sharply, because the time lag between their decision and the grant of habeas relief is much shorter and because the decision to grant habeas relief resembles appellate reversal. However, even the deterrence of state courts is not served by granting habeas corpus relief in cases where the federal law is unclear. In such cases, deterrence is not appreciably diminished by giving state courts the benefit of the doubt. Nagging concerns that a "reasonableness" standard of review gives state courts too much deference are misplaced in the new world created by this Court's criminal procedure revolution.

courts. The Act does not pretend to settle inter-sovereign disputes between the federal government and the states. Nor should it, based on what we have previously argued about the implications of the criminal procedure revolution. The Act merely limits the scope of substantive relief available under the habeas corpus statute, thus effectively redefining the statutory cause of action. In this manner, the Act is consistent with a view of habeas corpus under which deterrence has an important but limited role to play.

Section 106(b) of the Act, codified at 28 U.S.C. §2244(a) and (b), provides further evidence that the Act is consistent with the new model of habeas law that we have described:

> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. §2244(b)(2).

This provision is noteworthy for two reasons. First, even on successive applications, the Act permits a petitioner to obtain relief based on a claim of innocence. Second, however, that claim must be especially strong, given the petitioner's diminished right to obtain relief after his first application has already been denied. Put simply, this provision requires a petitioner to present new, "clear and convincing" evidence that the state convicted him only because of a constitutional error. It is, of course, possible for reasonable people to disagree about the appropriate level of protection for innocence claims contained in successive petitions. But determining that level requires consideration of a host of competing concerns -- not only of the protection due to habeas claimants but also the protection due to the interests in finality of the states and of crime victims. After evaluating all of these interests, Congress decided to protect only such claimants who can present new evidence that ought to substantially undermine the reviewing court's faith in the fundamental justice of the verdict. Due process, in our opinion, requires no more than this.

On balance, Title I of the Act appears to serve primarily the same two purposes -- protecting the innocent from unjust punishment and deterring misconduct by state courts -- as the new model of habeas corpus we have described. Moreover, the Act's treatment of deterrence strongly suggests that Congress has rejected the now-obsolete "federal courts" model of habeas corpus by narrowing the scope of the habeas corpus remedy without falling into the trap of attempting to resolve the so-called "parity" of state and federal courts. Whether consciously or unconsciously, Congress has recognized the implications of the criminal procedure revolution and acted accordingly. In so doing, it has also acted in a manner consistent with core due process values, and its efforts should therefore pass constitutional muster.

IV. THE PORTIONS OF THE ACT CHALLENGED IN THIS CASE DO NOT CURTAIL THE STATUTORY HABEAS CORPUS WRIT IN A MANNER INCONSISTENT WITH DUE PROCESS, AND THE CHALLENGES SHOULD BE REJECTED.

We have explained how fundamental changes in the relationship between federal and state law, and between federal and state courts, today require the development of a new, coherent model of habeas corpus. We have also outlined a proposed new model, designed to preserve the role of habeas corpus as an important component of due process, and we have demonstrated how Title I of the Act appears to be consistent with that new model. We now return to the specific challenges raised in this case, none of which are meritorious.

The first question presented is whether Title I of the Act, and in particular 28 U.S.C. §2244(b)(3)(E), is an unconstitutional restriction of this Court's jurisdiction. If this Court adheres to the approach of *Ex parte McCardle* and *Klein*, petitioner's challenge must be rejected. If, on the other hand, this Court adopts a broader view of Article III (such as that suggested by Hart), then the question becomes whether some part of the federal statutory writ of habeas corpus for state prisoners has acquired constitutional status, and is thus protected against Congressional appellate jurisdiction-stripping. Indeed, a part of the statutory writ is protected in this way. But there is nothing in section 2244(b)(3)(E) that could be said to violate the part of the statutory writ that we have so identified. Section 2244(b)(3)(E) simply places a greater share of the responsibility for adjudicating second and successive habeas corpus petitions in the hands of the courts of appeals, not the Supreme Court. This shift of responsibility for second and successive petitions -- which have long been subject to restrictions that did not apply to first petitions, *see, e.g., McCleskey v. Zant*, 499 U.S. 467 (1991) -- does not, in any

way, prevent habeas corpus from performing its two vital functions. *See* Steiker, "Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?," 92 Mich. L. Rev. 862, 916-18 (1994) (concluding that restrictions on successive petitions do not violate the Suspension Clause).

The second question presented is whether Title I of the Act amends 28 U.S.C. §2241, which governs the original jurisdiction of this Court and its Members to grant writs of habeas corpus. As explained previously, this question effectively asks whether the Court should interpret its section 2241 original jurisdiction more broadly, in light of the changes Title I makes to section 2254. But the challenged portions of the Act, with respect to second and successive habeas corpus petitions, do not make any changes that are so significant as to warrant a change in this Court's approach to section 2241. Because section 2244(b)(3)(E) does not prevent habeas corpus from performing its two vital functions, there is no good reason for this Court to broaden the scope of original habeas corpus jurisdiction under section 2241.

Finally, the third question presented is whether the Act represents a suspension of habeas corpus in violation of the Suspension Clause in Article I of the Constitution. If the Suspension Clause is read in light of its constitutional history, as protecting only the Great Writ known to the Framers, then the Act creates no violation because it amends only the statutory writ. If, on the other hand, this Court concludes that the Suspension Clause should be interpreted more broadly to provide protection for the core of the statutory writ, then the question becomes whether some part of the statutory writ has become fundamental to our modern-day conception of due process. A part of the statutory writ is fundamental in this way. But, as we have argued, the part of the statutory writ that is so protected is

the part that protects innocent defendants from unjust punishment and deters state-court misconduct. Because section 2244(b)(3)(E) makes no changes that would undermine these two core purposes of habeas corpus, the Act is consistent with due process and does not offend even a broad reading of the Suspension Clause.

CONCLUSION

For the foregoing reasons, the Court should lift its stay of petitioner's execution and affirm the decision of the Eleventh Circuit.

Respectfully submitted,

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No. 95-8836

In the Supreme Court of the United States

OCTOBER TERM, 1995

ELLIS WAYNE FELKER, PETITIONER

v.

TONY TURPIN, WARDEN, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND ON PETITION FOR A WRIT OF HABEAS CORPUS

BRIEF FOR SENATOR ORRIN G. HATCH, SPEAKER NEWT GINGRICH, CONGRESSMEN DICK ARMEY, TOM DeLAY, HENRY HYDE, SENATORS STROM THURMOND, CHARLES GRASSLEY, FRED THOMPSON, JON KYL, SPENCER ABRAHAM, CONGRESSMEN BILL McCOLLUM, GEORGE W. GEKAS, CHARLES T. CANADY, BOB INGLIS, SONNY BONO, FREDERICK K. HEINEMAN, ED BRYANT, SENATORS JOHN ASHCROFT, ROBERT F. BENNETT, THAD COCHRAN, ALFONSE D'AMATO, LAUCH FAIRCLOTH, BILL FRIST, JAMES INHOFE, TRENT LOTT, DON NICKLES, HARRY REID, RICK SANTORUM, RICHARD C. SHELBY, BOB SMITH, AND JOHN W. WARNER, AND CONGRESSMEN WAYNE ALLARD, RICHARD H. BAKER, BOB BARR, JOE BARTON, DOUG BEREUTER, JOHN BOEHNER, BILL K. BREWSTER, JON CHRISTENSEN, TOM A. COBURN, CHRISTOPHER COX, BILL EMERSON, PHIL ENGLISH, MEL HANCOCK, JAMES V. HANSEN, STEPHEN HORN, TIM Y. HUTCHINSON, ERNEST J. ISTOOK, JR., STEVE LARGENT, FRANK D. LUCAS, RON PACKARD, NICK SMITH, J. C. WATTS, JR., AND DAVE WELDON, AS AMICI CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

Title I of the Antiterrorism and Effective Death Penalty Act of 1996 (Apr. 24, 1996) (the Antiterrorism Act) restricts the ability of a prisoner confined under the judgment of a state court to file a second or successive petition for a writ of habeas corpus. In particular, Section 106(b)(3)(C) of the Antiterrorism Act, 28 U.S.C. §2244(b)(3)(C), prohibits a state prisoner from filing a second or successive habeas corpus petition in district court unless the prisoner first establishes, to a panel of circuit court judges, a prima facie case for relief. The questions presented by this case are the following:

1. Whether application of Title I of the Act in this case amounts to a suspension of the writ of habeas corpus, in violation of the Suspension Clause of the Constitution, Art. I, §9, Cl. 2.

2. Whether Title I of the Act is an unconstitutional restriction on the appellate jurisdiction of this Court.

3. Whether Title I of the Act applies to habeas corpus petitions filed as original matters in this Court pursuant to 22 U.S.C. §2241.

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INTEREST OF THE AMICI

This case raises important questions regarding the constitutionally of Congress' authority under Article III of the Constitution, as implemented in the Antiterrorism and Effective Death Penalty Act of 1996 (Apr. 24, 1996), to limit jurisdiction of federal courts to adjudicate second

or successive habeas corpus petitions.[1] Amicus Orrin Hatch was the primary sponsor of the habeas corpus bill in the Senate and is the Chair of the Senate Committee on the Judiciary, the Committee with jurisdiction over the bill that became that Act. He and the other amici are is vitally interested in seeing that the constitutionality of the Act is upheld. Members of Congress have participated as amici curiae in other cases involving important issues affecting the legislative branch, both by consent and by motion. *E.g., National Org. For Women v. Idaho,* 455 U.S. 918 (1982); *United States v. Helstoski,* 442 U.S. 477 (1979).[2]

SUMMARY OF ARGUMENT

I. The Act does not violate the Suspension Clause. That Clause protects the right to seek habeas relief from executive detention without supporting judicial process. The Act regulates only the collateral attack process and does not modify the writ's historic function. Nor does it authorize executive detention. The Constitution does not require collateral review of the judgment of a court of competent jurisdiction, but Congress has provided such relief. Congress' decision to permit such review does not mean that a subsequent restriction violates the Suspension Clause.

II. The Act does not unconstitutionally restrict the appellate jurisdiction of this Court. A prisoner, like petitioner, already has had numerous opportunities for judicial review. He has had the ability to assert claims of fact and law before a trial judge, the state supreme court and this Court on direct review; before a state trial judge, the state supreme court, and this Court in a state collateral proceeding; and, finally, before a federal district court judge, a federal court of appeals, and this Court in a federal habeas corpus proceeding. Congress has plenary authority to adopt neutral procedures that govern how and when specific claims may be raised by the litigation. Congress therefore can legitimately help the States enforce their capital sentencing laws by regulating the collateral attack process.

[1] For convenience, hereafter we will refer only to a "second" habeas petition.

[2] We have filed letters of consent with the Clerk of this Court.

III. The Antiterrorism Act vests the circuit courts with authority to make the final determination whether an inmate may file a second habeas petition. This Court should not construe 28 U.S.C. §2241 as allowing petitioner to file a habeas petition to seek review of the judgment below and thereby frustrate this purpose of the Act.

ARGUMENT

THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT IS A CONSTITUTIONAL EXERCISE OF CONGRESS' ARTICLE III AUTHORITY TO REGULATE THE HABEAS JURISDICTION OF THE FEDERAL COURTS

After considering and debating the reform of federal habeas corpus for more than 15 years,[3] Congress enacted

[3] *See, e.g., Habeas Corpus; Hearings on S. 1314 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary,* 94th Cong., 2d Sess. (1976); *Federal Habeas Corpus; Hearing Before the Subcommittee on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary* 95th Cong., 2d Sess. (1978); *Habeas Corpus Procedures Amendments Act of 1981: Hearing on S. 653 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary,* 97th Cong., 1st Sess. (1981); *The Habeas Corpus Reform Act of 1982; Hearing on S. 2216 Before the Senate Comm. on the Judiciary,* 97th Cong., 2d Sess. (1982); *Federal Criminal Law Revision, Parts 2 & 3; Hearings on H.R. 1647, et al., Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary,* 97th Cong., 1st & 2d. Sess. (1981 & 1982); *Comprehensive Crime Control Act of 1983: Hearings on S. 829 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary,* 98th Cong., 1st. Sess. (1983); *Federalism and the Federal Judiciary: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary,* 98th Cong., 1st Sess. (1983); *Habeas Corpus Reform: Hearings Before the Senate Comm. on the Judiciary,* 99th Cong., 1st Sess. (1985); *Habeas Corpus Reform: Hearings on S. 88, S. 1757, and S. 1760 Before the Senate Comm. on the Judiciary,* 101st Cong., 1st & 2d Sess. 8 (1989) & 1990) (hereinafter *1990 Senate Hearings); Habeas Corpus Legislation: Hearings Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary,* 101st Cong., 2d Sess. (1990); *Fed-*

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the Antiterrorism and Effective Death Penalty Act of 1996 (the Antiterrorism Act). Frustrated by lengthy delays in the execution of validly imposed capital sentences, Congress enacted that law in order (among other things) to amend the statutory writ of habeas corpus as a means of helping the federal and state governments effectively implement their capital sentencing statutes, and thereby advance public safety, while preserving the ability of the common law writ of habeas corpus to serve its historic function of preventing unjustified executive detention. Those are interests of the highest order. The ability to resort to the writ to prevent executive detention without judicial process was an important development in Anglo-American legal history and always has stood as a centerpiece of our liberties. At the same time, it cannot be gainsaid that there is no more legitimate and necessary function for Congress and the States than to protect public safety. After all, "[t]he most basic function of any government'" is "'provi[sion] for the security of the individual and of his property,'" *Illinois v. Gates,* 462 U.S. 213, 237 (1983) (quoting *Miranda v. Arizona,* 384 U.S. 436, 539 (1966) (White, J., dissenting)), and government, whether federal, state, or local, has "a legitimate

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eral Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearings Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the Senate Comm. on the Judiciary, 101st Cong., 2d Sess. (1990); *Violent Crime Control Act of 1991: Hearings on S. 618 and S. 635 Before the Senate Comm. on the Judiciary,* 102d Cong., 1st Sess. (1991); *Race Claims and Federal Habeas Corpus; Hearings Before the Subcomm. On Civil and Constitutional Rights of the House Comm. on the Judiciary,* 102d Cong., 1st. Sess. (1991); *Habeas Corpus Issues: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary,* 102d Cong., 1st Sess. (1991); *Innocence and the Death Penalty: Hearings on S. 221 Before the Senate Comm. on the Judiciary,* 103d Cong., 1st Sess. (1993); *Habeas Corpus: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary,* 103d Cong., 1st & 2d Sess. (1993 & 1994); *Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process: Hearings Before the Senate Comm. on the Judiciary,* 104th Cong., 1st Sess. (1995) (hereinafter *1995 Senate Hearing*).

and compelling state interest in protecting the community from crime * * *," *Schall v. Martin,* 467 U.S. 253, 264 (1984) (quoting *DeVeau v. Braisted,* 363 U.S. 144, 155 (1960)). The Federal Government and 39 States have enacted capital sentencing statutes to fulfill that responsibility, and they indisputably have a legitimate and compelling interest in enforcing those laws, *E.g., McCleskey v. Kemp,* 481 U.S. 279 (1987); *Gregg v. Georgia,* 428 U.S. 153 (1976).

The Antiterrorism Act is an historic, progressive reform of the statutory habeas corpus process. Among other things, it restricts a state prisoner's ability to hamstring a State's efforts to carry out a capital sentence by regulating his opportunity to file a second or successive habeas petition. Section 106(b)(3)(A) of the Act, 28 U.S.C. §2244(b)(3)(A), requires that a prisoner (like petitioner) obtain authorization from a federal court of appeals (here, the Eleventh Circuit) before he can file such a petition in district court. The Act bars a circuit court from authorizing such a filing unless the prisoner first establishes a prima facie case that he is entitled to relief. §106(b)(3)(C), 28 U.S.C. §2244(b)(3)(C). To make that showing, a prisoner must prove either (1) that "the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," or (2) both that "the factual predicate for the claim could not have been discovered through the exercise of due diligence" and that "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." §106(b)(2)(A)–(B), 28 U.S.C. §2244(b)(2)(A)–(B). The Act also makes clear that a circuit court's decision to approve or deny the filing of a second habeas petition is not subject to en bloc review by the full court of appeals or to certiorari review by this Court. §106(b)(3)(E), 28 U.S.C. §2244(b)(3)(E).

In this case, in December 1981, less than one year after being released from prison for an aggravated sodomy conviction, petitioner "used deception to lure Evelyn Joy Ludlam, a nineteen-year-old college student working as a waitress, to his residence. There, he forcibly subjected her to bondage, beating, rape, and sodomy".[4] Thereafter, petitioner "murdered her and threw her body in a creek".[5] Early in 1983, petitioner was convicted of capital murder in Georgia state court and was sentenced to death. After exhausting unsuccessfully his remedies on direct appeal, in state collateral proceedings, and in one round of federal habeas litigation,[6] petitioner sought to file a second habeas petition containing two new claims.[7] As required by the Antiterrorism Act, petitioner sought permission to file a second habeas petition from the Eleventh Circuit, which denied his request. *Felker v. Turpin,* No. 96–1077 (11th Cir. May 2, 1996).[8]

[4] *Felker v. Thomas,* 52 F.3d 907, 908 (11th Cir.), *supplemented,* 62 F.3d 342 (1995), *cert. denied,* 116 S. Ct. 956 (1996).

[5] *Id.*

[6] Petitioner appealed to the Georgia Supreme Court, which upheld his conviction and sentence. *Felker v. State,* 314 S.E.2d 621 (Ga. 1984). This Court denied review. 469 U.S. 873 (1984). Petitioner then filed a postconviction challenge in state court. The state trial court denied petitioner relief; the Georgia Supreme Court denied his petition to appeal that denial; and this Court denied certiorari, *Felker v. Zant,* 502 U.S. 1064 (1992). Thereafter, petitioner sought habeas relief in federal district court, which denied his request. The court of appeals affirmed the district court's judgment, *Felker v. Thomas,* 52 F.3d 907 (11th Cir.), *supplemented,* 62 F.3d 342 (1995), and this Court denied review, 116 S. Ct. 956 (1996).

[7] One was that the jury instructions at his trial on the "reasonable doubt" standard were invalid under *Cage v. Louisiana,* 498 U.S. 39 (1990). The other was that the Eighth and Fourteenth Amendments prohibit "a non-physician, state agent [from] provid[ing] the sole evidence" establishing the time of death. *Felker v. Turpin,* No. 96–1077, slip op. 6 (11th Circ. May 2, 1996).

[8] The court refused to allow petitioner to file his jury instruction claim, on the ground that he could have asserted that contention in his first habeas petition. Slip op. 5–6. The court denied petitioner the right to assert his second claim for the same reason and also because he impermissibly sought retroactive application of a new rule of constitutional law. *Id.* at 6–7. The court of appeals also rejected petitioner's claim that the habeas restrictions contained in the Antiterrorism Act are unconstitutional, on the ground that petitioner could not have obtained relief under pre-Act decisions, such as *Schlup v. Delo,* 115 S. Ct. 851 (1995), *Herrera v. Collins,* 506 U.S. 390 (1993), and *McCleskey v. Zant,* 499 U.S. 467 (1991). *Felker,* slip op. 7–23.

Petitioner renews in this Court the contentions that he raised in the Eleventh Circuit, and he also argues that the Antiterrorism Act is unconstitutional insofar as it denies him the right to seek review of the panel's ruling before the en banc Eleventh Circuit or in this Court. What is more, petitioner has sought to invoke the original jurisdiction of this Court as an alternative basis for obtaining habeas corpus relief. In its order granting certiorari and staying petitioner's execution, this Court directed the parties to address three questions involving the constitutionality of the Act. For the reasons explained below, there is no merit to petitioner's claims.

I. The Act Does Not Violate the Suspension Clause

The Antiterrorism Act does not suspend the writ of habeas corpus, in violation of the Suspension Clause. Throughout Anglo-American legal history, the concept of suspending the writ of habeas corpus has had a specific and quite limited meaning. Historically, the writ of habeas corpus was designed, not for use in reviewing a final judgment of conviction, but in preventing executive detention without judicial process or (to achieve that purpose) in determining whether a particular court had jurisdiction over a prisoner.[9] The Framers adopted the Suspen-

[9] The discussion below of habeas corpus and suspension is taken from 1 William Blackstone, *Commentaries* (transliteration provided) (1st ed. 1765–1769); William S. Church, *Habeas Corpus* 41–47 (2d ed. 1893); William F. Duker, *A Constitutional History Habeas Corpus* 141–49 (1980); Albert Glass, *Historical Aspects of Habeas Corpus,* 9 St. John's L. Rev. 55 (1934); 9 Sir William Holdsworth, *A History of English Law* 104–25 (2d ed. 1938); Rollin C. Hurd, *A Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus and the practice Connected with It with a View of the Law of Extradition of Fugitives* 116–128, 132–53 (2d ed. 1876); Edward Jenks, *The Story of Habeas*

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sion Clause to limit the circumstances in which executive detention would be permissible. They did not include within its compass restrictions on a federal court's ability to set aside a state court's final judgment in a criminal case. The writ of habeas corpus protected from suspension by the Constitution stems from the common law writ and does not relate to the modern, judicially-expanded, statutory writ. Accordingly, the Antiterrorism Act does not remotely implicate the concerns underlying the Suspension Clause, and the Act's application to petitioner is clearly valid.

A. The Suspension Clause Is Limited To Extrajudicial Detention

1. The early history of the writ in England is obscure, but by the 17th century the writ had become accepted as a mechanism for preventing illegal confinement by executive officials.[10] At the same time, the writ was not uniformly available; courts, for example, were powerless to issue the writ when not in session. The Crown not only exploited this defect, but also sought to imprison citizens

Corpus, 18 L. Q. Rev. 64 (1902); George F. Longsdorf, *Habeas Corpus: A Protean Writ and Remedy*, 8 F.R.D. 179 (1948); Badash K. Mian, *American Habeas Corpus: Law, History, and Politics* 101–52 (1984), and summarizes the discussion found in the addendum to the Brief for the United States in *Swain v. Presley*, 430 U.S. 372 (1977) (O.T. 1975, No. 75–811).

[10] Habeas corpus finds its ancestry in enactments as early as 1166 A.D., in the Assize of Clarendon, an early legislative enactment of King Henry II, which provided, in part, as follows: "And when a robber or murderer * * * has been arrested * * * if the justices are not about to come speedily enough into the country where they have been taken, let the sheriffs send word to the nearest justice by some well-informed person that they have arrested such men, and the justices shall send back word to the sheriffs informing them where they desire the men to be brought before them; and let the sheriffs bring them before the justices." *English Historical Documents* 408 (David Douglas & George W. Greenway eds. 1953). Writs providing for the release of unlawfully imprisoned persons were well known to courts of chancery and common law throughout the 14th and 15th centuries. For the next 200 years, common law courts invoked the writ in jurisdictional disputes with courts of chancery, admiralty, and the Star Chamber.

outside England and therefore beyond the writ's jurisdiction. To remedy those defects, Parliament enacted the Habeas Corpus Act of 1679, 31 Car. II, c. 2. That law stands as an historic protection against unjustified detention, but it excluded "[p]ersons convict or in execution by legal process" from the benefits of the Act. *Id.;* see § III. A person convicted by a court of competent jurisdiction was not deemed to be held in violation of the law.

History would not have treated regulation of a convicted prisoner's right to file a second habeas petition as a "suspension" of the writ. Suspension in England was a legislative enactment nullifying the effect of the Habeas Corpus Act of 1679, thereby allowing confinement without bail, indictment, or other judicial process. Parliament suspended the provisions of the Act on numerous occasions, usually for a limited class of persons, such as those suspected of treason.[11] Given that precedent, there is little doubt that the Framers would have considered the writ to be secure if a prisoner was given at least one opportunity to apply for release under it.

2. There is no indication that the Framers held a different understanding of the writ. On May 29, 1787, four days after the Philadelphia Convention was called to order, Charles Pinckney of South Carolina submitted his

[11] The Habeas Corpus Act was suspended because of conspiracies against the King in 1688, 1 Wm. & Mary I, c. 2, 7, 19, and again in 1696, 7 & 8 Wm. III, c. 11. Activities of the Jacobites resulted in suspension in 1714, 1722, and 1744. 1 Geo. I, st.2, c. 8, 30; 9 Geo. I, c. 1; 17 Geo. II, c. 6. *See King* v. *Earl of Orrery*, 88 Eng. Rep. 75 (1722). Parliament suspended the writ during the American Revolution for persons suspected of treason or piracy. 17 Geo. III, c. 9; 18 Geo. III, c.1; 19 Geo. III, c. 1; 20 Geo. III, c. 5; 21 Geo. III, c. 2; 22 Geo. III, c. 1; *see 2 Works of Edmund Burke* 1–42 (1839). A similar suspension occurred in Massachusetts shortly before the Constitutional Convention. During Shay's Rebellion in 1786–1787, the Massachusetts legislature suspended the privilege of the writ. The statute provided that "any person or persons whatsoever, whom the Governor and Council, shall deem the safety of the Commonwealth requires" would be "continued in imprisonment, without Bail or Mainprize, until he shall be discharged therefrom by order of the Governor, or of the General Court." Mass. Laws 1786, c. 41.

"Draught of a Federal Government," which included a federal writ of habeas corpus. 3 *The Records of the Federal Convention of 1787,* at 604–09 (Max Farrand ed. 1966) (hereinafter Farrand). Pinckney proposed inclusion of the following language: "The privileges of and benefits of the writ of habeas corpus shall be enjoyed in this government in the most expeditious and ample manner: and shall not be suspended by the legislature except upon the most urgent and pressing occasion and for a time period not exceeding—months." 2 Farrand 341. Debate on the proposal was limited,[12] but what was said does not indicate that it was meant to include collateral challenges to federal convictions, to say nothing of state court convictions. Recognizing that habeas corpus might need to be suspended during certain critical times, the Framers added, by a vote of seven States to three, the qualifying proviso: "unless in cases of rebellion or invasion the public safety may require it." This proposal, introduced by Gouverneur Morris, was a reworking of Charles Pinckney's original proposal to the Committee on Detail, and sparked the only debate on the writ. The debate in the Constitutional Convention focused not on whether a clause including the writ should be in the Constitution, but on whether a suspension clause was necessary and, if so, how it might be worded to grant maximum protection to citizens without jeopardizing the nation's security in the event of an emergency.

[12] James Madison's notes on the debate state the following:

Mr. Rutledge was for declaring the habeas corpus inviolate. He did not conceive that a suspension could ever be necessary, at the same time, through all the states.

Mr. Gouverneur Morris moved, that "the privilege of the writ of habeas corpus shall not be suspended, unless where, in cases of rebellion or invasion, the public safety may require it."

Mr. Wilson doubted whether in any case a suspension could be necessary, as the discretion now exists with judges, in most important cases, to keep in gaol or admit to bail.

5 *Debates on the Adoption of the Federal Constitution* 484 (J. Elliot ed. 1863).

As adopted, the Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Art. 1, §9, Cl. 2. The Constitution, like the Habeas Act of 1679, did not create the writ of habeas corpus, nor did it define the scope of that writ. Rather, it assumed that the common law writ would be available by promising that it could not be suspended.[13] At the time of the Constitution's adoption, the rule at common law was that "once a person had been convicted by a superior court of general jurisdiction, a court disposing of a habeas corpus petition could not go behind the conviction for any purpose other than to verify the formal jurisdiction of the committing court." Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus,* 64 Mich. L. Rev. 451, 468 (1966). The Framers were well acquainted with the common law writ's function as a means of protecting against unlawful executive detention. Accordingly, instead of spelling out what the writ entailed, the Framers instead chose to include language preventing Congress from suspending the writ except in extraordinary circumstances.

In sum, the Framers were concerned with restricting the legislative power, one that repeatedly had been exercised in England, to deny to entire categories of persons the ability to seek relief from executive detention through the writ. The Framers adopted the Suspension Clause to deal with that specific problem. The purpose of that Clause was to provide that such a total suspension could

[13] The Judiciary Act of 1789 authorized federal courts to issue "writs of * * * habeas corpus. * * * And that either the justices of the Supreme Court as well as the judges of the District Court, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment." Nonetheless, the Act forbade extension of the writ "to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States * * *." 1 Stat. 81. The federal judiciary thus had no authority to issue writs to citizens imprisoned under State authority.

occur only in time of war or rebellion, and even then only if the public safety required it.[14]

3. This Court's decisions demonstrate that the writ of habeas corpus protected by the Constitution does not encompass collateral review of convictions entered by courts of competent jurisdiction. This Court has long recognized that:

> Although the objective of the Great Writ long has been the liberation of those unlawfully imprisoned, at common law a judgment of conviction rendered by a court of general criminal jurisdiction was conclusive proof that confinement was legal. Such a judgment prevented issuance of the writ without more.

United States v. Hayman, 342 U.S. 205, 210–11 (1952) (footnote omitted). This Court's early decisions reflect a similar understanding, *e.g.*, *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201–03 (1830); *Ex parte Watkins*, 32 U.S. (7 Pet.) 568 (1834); *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 101 (1868); *see Frank v. Magnum*, 237 U.S. 309, 329–31 (1915), as do more recent cases, *e.g.*, *Wainwright v. Sykes*, 433 U.S. 72, 77–78 (1977).[15]

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[14] Subsequent history confirms that reading of the Suspension Clause. This power to suspend the privilege in time of war or rebellion has several times been exercised or sought to be exercised. In 1807, after the exposure of the Burr conspiracy, President Jefferson proposed a suspension of the writ for three months in cases of treason or other high crime or misdemeanor. The measure passed the Senate with one dissent, but it was defeated in the House. *See* 16 Annals of Congress 44, 402 et seq., 531–35 (1807); 3 Albert J. Beveridge, *Life of John Marshall* 343–48 (1919). President Lincoln, without legislative authority, suspended the writ or authorized its suspension on several occasions early in the Civil War. *See* 7 James D. Richardson, *A Compilation of the Messages and Papers of the Presidents, 1789–1902*, at 3217–20, 3240, 330, 3303–05, 3313, 3322 (1897); *Ex parte Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9,487) (Taney, Circuit Justice). In 1863 Congress authorized suspension of the writ. Act of Mar. 3, 1863, 12 Stat. 755; *see also* 7 James D. Richardson, *supra*, at 3371–72 (Proclamation by the President of Sept. 15, 1863, suspending the privilege of the writ of habeas corpus throughout the United States).

[15] Judge Henry Friendly noted that "[i]t can scarcely be doubted that the writ protected by the suspension clause is the writ as known to the framers, not as Congress may have chosen to expand it or, more pertinently, as the Supreme Court has interpreted what Congress did." *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 170 (1970); *accord 1990 Senate Hearings* 31 (statement of Hon. Lewis Powell).

In this legislation, Congress, of course, has not limited statutory federal habeas review to its common law basis; nor has Congress elected altogether to abolish review of convictions entered by courts of competent jurisdiction. This Court need not, therefore, decide whether Congress could do so. In this Act, Congress has sought merely to set reasonable limits on the availability of post-conviction, collateral review, particularly second habeas petitions. Such legislation is entirely within Congress' prerogative and does not run afoul of the Suspension Clause.

For more than a century, this Court gradually expanded the federal courts' authority to review state court convictions, even though Congress did not change the relevant language of the habeas statutes in the interim. *See generally Sykes*, 433 U.S. at 77–80. This Court never has held that those expansions were constitutionally required. If so, then Congress clearly has the power to revise this Court's interpretation of the statutory writ. Otherwise, the Suspension Clause acts as a constitutional ratchet—permitting the courts to expand the scope of the writ, but then constitutionalizing each such expansion and placing it beyond further legislative action. Under that theory, the federal courts could usurp Congress' legislative power. Such a theory is neither jurisprudentially sound, nor appropriate as a matter of public policy. If this Court is not "imprisoned by every particular of habeas corpus as it existed in the late 18th and 19th centuries," *Schneckloth v. Bustamonte*, 412 U.S. 218, 256 (1973) (Powell, J., concurring), then neither is it imprisoned by every judicial expansion of the writ.

B. The Act Does Not Authorize Executive Detention

The Antiterrorism Act does not implicate the concerns prompting the Framers to adopt the Suspension Clause.

Nothing in the Act prevents a person from filing a habeas petition to inquire into the court's jurisdiction or, before trial, to challenge his arrest. As relevant here, the Act only limits a prisoner's ability to file a second habeas petition challenging his conviction. Even then, it only requires that he establish a prima facie case of success in order to seek such relief. The Act does not endorse executive detention without judicial process any more than this Court's decisions in *Wainwright v. Sykes* and *Teague v. Lane*, 489 U.S. 288 (1989), did so. For the same reasons that this Court's decisions did not violate the Suspension Clause, the Antiterrorism Act also does not.

II. The Act Does Not Unconstitutionally Restrict the Appellate Jurisdiction of This Court

A. Congress Has Broad Power To Regulate This Court's Appellate Jurisdiction

Constitutional analysis, like statutory interpretation, must begin with the text of the relevant provision, and "the plain language of the enacted text is the best indicator of intent." *Nixon v. United States*, 506 U.S. 224, 232 (1993). The text of Article III is illuminating in this regard. It provides that "[t]he judicial Power * * * shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," Art. III, § 1; it defines the type of cases over which "the judicial Power shall extend," Art. III, § 2, Cl. 1; and it distinguishes between the original and appellate jurisdiction of this Court, Art. III, § 2, Cl. 2. The Court's "original Jurisdiction" is limited to "all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party," while this Court's "appellate Jurisdiction" is subject to definition by Congress, which is empowered to make "such Exceptions, and under such Regulations," as the legislature deems fit. *Id.* Construing Article III, this Court repeatedly has held that

Congress has the power to limit the jurisdiction of the federal courts.[16]

Those principles apply fully in the case of statutory habeas corpus petitions. Federal courts cannot issue a writ of habeas corpus without express statutory authority, and Congress can refuse to grant federal courts the power to issue such writs. *Ex parte Bollman*, 8 U.S. (4 Cranch) 74, 93–94 (1807). As Chief Justice Marshall explained in *Ex parte Bollman*, "for the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law." 8 U.S. (4 Cranch) at 93–94. In recognition of the importance of limited postconviction review, Congress established the statutory system that has governed habeas corpus from more than a century. The Antiterrorism Act narrows the authority granted to the federal courts, while still providing avenues for relief.

Moreover, Congress can modify appellate jurisdiction granted to this Court in habeas cases. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869). In *McCardle*, this Court held that Congress by statute, Act of Mar. 27, 1868, 15 Stat. 44, could withdraw this Court's appellate jurisdiction over habeas petitions filed under the Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385 (Feb. 5, 1867) (codified at Rev.

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[16] *E.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 331 (1966); *Clark v. Gabriel*, 393 U.S. 256 (1968); *Bowles v. Willingham*, 321 U.S. 503 (1944); *Yakus v. United States*, 321 U.S. 414 (1944); *Lockerty v. Phillips*, 319 U.S. 182, 187–88 (1943); *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 129 (1941); *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922); *Hallowell v. Commons*, 239 U.S. 506, 509 (1916); *Stevenson v. Fain*, 195 U.S. 165, 167 (1904); *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 251–52 (1868); *Sheldon v. Sill*, 49 U.S. (8 How.) 440, 448 (1850) ("Courts created by statute can have no jurisdiction but such as the statute confers."); *Carey v. Curtis*, 44 U.S. (3 How.) 244–45 (1845); *McIntire v. Wood*, 11 U.S. (7 Cranch) 503, 504 (1813); *United States v. Hudson*, 11 U.S. (7 Cranch) 31, 32 (1812); *Durousseau v. United States*, 10 U.S. (6 Cranch) 312, 312–13 (1812); *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 7, 11 (1799).

Stat. §766 (2d ed. 1878)). In the Court's words: "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words." 74 U.S. (7 Wall.) at 514.

At the same time, this Court has said that Congress' Article III power is not boundless. *See Klein v. United States,* 80 U.S. (13 Wall.) 128 (1872).[17] In *Klein,* this Court recognized two limitations on Congress's Article III authority. *First,* Congress cannot exercise this Court's "judicial Power," Art. III, §1, by invoking its "legislative Power[]," Art. I, §1, to regulate the appellate jurisdiction

[17] In *Klein,* Congress attempted to deny members of the Confederacy the opportunity to sue for the return of property taken from them during the Civil War. The obstacle facing Congress was that President Andrew Johnson had granted members of the Confederacy a full and unconditional amnesty, which otherwise would have had the effect of allowing them to seek the proceeds of their property in the Court of Claims. In order to nullify the effect of President Johnson's pardon, Congress by statute provided, in effect, that proof of a pardon for participating in the Civil War "shall be conclusive evidence of the acts pardoned, but shall be null and void as evidence of the rights conferred by it." 80 U.S. (13 Wall.) at 144. The act also directed this Court to dismiss for want of jurisdiction any case in which the Court of Claims had entered judgment. *Id.* at 143. This Court refused to enforce the statute, on the ground that it was unconstitutional. The Court acknowledged that Congress had plenary authority to regulate the jurisdiction of lower federal courts, as well as the appellate jurisdiction of this Court. *Id.* at 145. Nevertheless, the Court concluded that the statute exceeded Congress's legislative power and sought, instead, to vest in Congress the judicial power to decide cases pending in this Court, because it, in effect, directed this Court to enter a specific judgment without altering the underlying substantive law. *Id.* at 146 ("What is this but to prescribe a rule for the decision of a cause in a particular way?"). In so doing, the Court noted, "Congress has inadvertently passed the limit which separates the legislative from the judicial power." *Id.* at 147. Equally objectionable, in the Court's view, was Congress's attempt to sap a Presidential pardon of the remedial effect guaranteed by Article II, *id.* at 147–48, a power that the Court previously had described as "unlimited" (except for "cases of impeachment") and "not subject to legislative control," *Ex parte Garland,* 71 U.S. (4 Wall.) 333, 380 (1866).

of this Court. 80 U.S. (13 Wall.) at 146–47; *see Plaut v. Spendthrift Farm,* 115 S. Ct. 1447, 1452 (1995) (so characterizing *Klein*); *cf. INS v. Chadha,* 462 U.S. 919 (1983) (Congress cannot veto decisions of executive officials); *Bowsher v. Synar,* 478 U.S. 714 (1986) (1983) (Congress cannot appoint executive officials). *Second,* Congress cannot exceed limitations on its Article III power stemming from an independent source, such as the President's Article II pardon power. 80 U.S. (13 Wall.) at 147–48; *cf. Adarand Constructors v. Pena,* 115 S. Ct. 2097 (1995) (Congress cannot discriminate in the exercise of its Commerce Clause power).

Here, that first limitation is inapposite. Congress has not itself sought to exercise the judicial power by deeming any category of claims nonmeritorious and directing this Court (or any other) to enter judgment. Instead, Congress has left to panels of appellate court judges selected by each circuit the responsibility to decide that issue on the law and facts of each case. Compare *Robertson v. Seattle Audubon Society,* 503 U.S. 429, 438 (1992) (Congress amended the underlying statute rather than "compel * * * findings or results under old law'). Accordingly, the question becomes whether the Antiterrorism Act violates an external limitation on Congress's Article III authority, similar to the President's Article II pardon power at stake in *Klein.* Since the Antiterrorism Act limits federal courts" ability to entertain a second habeas petition, the Act raises two issues in this regard. The first question is whether application of the Act to petitioner amounts to a suspension of the writ of habeas corpus, in violation of Art. I, §9, Cl. 2. As discussed above in Point I, the Act does not suspend the writ of habeas corpus. The second question is whether due process forbids Congress from requiring a prisoner, as an alternative to seeking relief in the state courts or the state clemency process, to make a prima facie showing of success before a federal circuit court in order to file a second habeas petition. As discussed below, that question must be answered in the negative.

B. Congress' Procedure For Adjudicating Second Habeas Petitions Does Not Violate The Due Process Clause

The Due Process Clause prohibits a State from punishing someone criminally until it has proved his guilt beyond a reasonable doubt at a trial held in accordance with relevant constitutional guarantees. *Bell v. Wolfish,* 441 U.S. 520, 535–36 & n.16 (1979). But the corollary is that once a person has been fairly convicted of an offense, he is eligible for and the government can impose whatever penalty is authorized by law for his crime, as long as that penalty is not cruel and unusual. *Chapman v. United States,* 500 U.S. 453, 465 (1991). The question, then, is whether due process requires that a prisoner, like petitioner—who already has had the opportunity to assert his claims of fact and law before a trial judge (in some states perhaps also a state intermediate appellate court), the state supreme court, and this Court on direct review; before a state trial judge (in some cases perhaps also a state intermediate appellate court), the state supreme court, and this Court in a state collateral proceeding; before a federal district court judge, a federal court of appeals, and this Court in a federal habeas corpus proceeding; and, finally, before a circuit court panel in a second federal habeas proceeding—be given yet another opportunity to present claims in a second habeas petition to this Court before his sentence can be carried out. We submit that the answer clearly and resoundingly is "no." The Antiterrorism Act cannot be held invalid under the Due Process Clause unless it "offend[s] some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental." *Medina v. California,* 505 U.S. 437, 445 (1992) (citation omitted). None of this Court's decisions supports such a claim.[18]

[18] It is procedural, not substantive, due process concerns that are at stake here. Parties like petitioner already have been convicted, so they no longer enjoy the presumption of innocence. *Barefoot v. Estelle,* 463 U.S. 880, 887 (1983). The question for them is whether they are entitled to judicial review of their claims, and that question raises only procedural due process concerns. *Herrera v. Collins,* 506 U.S. 390, 407 n.6 (1993).

1. Congress historically has exercised broad latitude to establish, as it found necessary, avenues for direct and collateral review of a judgment of conviction in a criminal case. For example, the Judiciary Act of 1789, § 14, 1 Stat. 81, did not establish a right to appeal a conviction in a criminal case. Congress did not create a general right to appeal in federal capital cases until 1889, Act of Feb. 6, 1889, § 6, 25 Stat. 655, 656, and Congress did not extend that right to all criminal cases until 1891, the Circuit Courts of Appeals (Evarts) Act, § 5, 26 Stat. 827 (1891). Postconviction review of federal or state court judgments by federal courts also was a late development. The Judiciary Act of 1789 authorized federal courts to issue writs of habeas corpus for prisoners in federal custody, but specifically excepted cases in which prisoners were in custody under or "by color of the authority of the United States * * *." Congress later extended the writ to federal officers in state custody for executing federal law, Act of Mar. 2, 1833, § 7, 4 Stat. 632, 634, and to foreign nationals held by state officers, Act of Aug. 29, 1842, 5 Stat. 539. The federal courts, however, could not review convictions entered by state courts until Congress passed the Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385 (codified at Rev. Stat. § 766 (2d ed. 1878)). *See* Dallin H. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court,* 1962 Sup. Ct. Rev. 153, 180-82. Throughout that period, this Court never suggested that the Constitution required Congress to adopt postconviction procedures for federal or state prisoners, or to regulate the post-trial process in any particular manner.[19]

[19] Indeed, the contrary is true. For more than a century, the Court has made clear that a defendant does not have a constitutional right to appeal a conviction or sentence, let alone to challenge a conviction in habeas corpus proceedings. The Court first articulated that principle in *McKane v. Durston,* 153 U.S. 684 (1894). One year later, the Court applied it in a capital case. *Andrews v. Swartz,* 156 U.S. 272 (1895); *see also Bergemann v. Backer,* 157 U.S. 655, 659 (1895) (reject-

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The regulation of second habeas petitions contained in the Antiterrorism Act easily fits within that tradition. As relevant here, the Act limits only a prisoner's ability to litigate federal claims at the back end of what has become a long, multi-stage process by which capital cases are reviewed. The Act restricts a prisoner's right to file a second habeas petition challenging a state conviction. That restriction arises only after a prisoner has litigated unsuccessfully in pretrial, trial, post-trial, and direct appeal proceedings in state court; in post-conviction proceedings

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ing similar claim in a capital case); *Ex parte Gordon*, 66 U.S. 503 (1862) (there is no right to appeal in federal cases unless authorized by statute, even in a capital case); *cf. Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1863) (ruling that this Court lacks appellate jurisdiction over military courts-martial absent statutory authorization). Since then, the Court has reiterated that principle on numerous occasions. *See Kohl v. Lehlback*, 160 U.S. 293, 297, 299 (1895); *Murphy v. Massachusetts*, 177 U.S. 155, 158 (1900); *Reetz v. Michigan*, 188 U.S. 505, 508 (1903); *Frank v. Mangum*, 237 U.S. 309, 327 (1915); *Luckenbach S.S. Co. v. United States*, 272 U.S. 533, 536 (1926); Ohio ex rel. *Bryant v. Akron Metro. Dist.*, 281 U.S. 74, 80 (1930); *Willis v. Tennessee*, 296 U.S. 533 (1935); *District of Columbia v. Clawans*, 300 U.S. 617, 627 (1937); *Carter v. Illinois*, 329 U.S. 173, 175 (1946); *Brown v. Allen*, 344 U.S. 443, 486 n.36 (1953); *National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37, 42 n.6 (1954); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (plurality opinion); *id.* at 21 (Frankfurter, J., concurring in the judgment); *Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973); *Ross v. Moffitt*, 417 U.S. 600, 606, 611 (1974); *Estelle v. Dorrough*, 420 U.S. 534, 536 (1975); *United States v. MacCollom*, 426 U.S. 317, 323 (1976) (plurality opinion); *Abney v. United States*, 431 U.S. 651, 656 (1977); *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *Evitts v. Lucey*, 469 U.S. 387, 393 (1985); *Pennsylvania v. Finley*, 481 U.S. 551, 555-556 (1987); *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (plurality opinion). The Court reaffirmed it last Term in *Goeke v. Branch*, 115 S. Ct. 1275, 1278 (1995), stating, in reliance on *McKane*, that "due process does not require a State to provide appellate process at all." In sum, this Court's precedents make clear that the Nation's history and traditions allow Congress broad leeway to regulate the statutory habeas corpus process. Of course, the amici firmly believe that a defendant's ability to pursue a direct appeal of his conviction and sentence is, as a matter of policy, a valuable component of our criminal justice system. Nothing in the Antiterrorism Act in any way limits that ability.

filed in state trial court and appealed through the state appellate system; and in an original round of litigation in habeas proceedings in federal district court and circuit court, with review available in this Court at the end of each of those rounds of proceedings. The Act does not regulate antecedent stages of the process, and it does not touch on the historic function of habeas corpus, viz., the use of the writ to obtain release from illegal executive detention.

2. The procedures in the Antiterrorism Act are reasonably designed to achieve the goals noted above. For example, the Act requires a prisoner seeking to file a second habeas petition to obtain authorization from a circuit court to do so by establishing a prima facie case that he is entitled to relief. That procedure is similar to one that Congress enacted in 1908 in the hope of achieving much the same purposes as the new law. Then, Congress adopted the probable cause requirement in 28 U.S.C. §2253. That law requires a prisoner, whose application for habeas relief has been denied by the district court, to obtain a certificate of probable cause to appeal from that court, from a circuit court (or judge thereof), or from this Court (or one of its Members) in order to perfect an appeal. Otherwise, neither a circuit court nor this Court could grant relief, since each one would lack jurisdiction over the prisoner's appeal.[20]

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[20] At that time, condemned state prisoners were abusing the then-existing version of the Habeas Corpus Act of 1867, Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (codified at Rev. Stat. §766 (2d ed. 1878)), in order to forestall their execution. Section 1 authorized federal courts to review state court judgments and provided that any such judgment would be stayed automatically whenever a state prisoner filed a habeas petition until all federal proceedings had been completed. §1, 14 Stat. 386. The result was that state prisoners could fend off execution as long as they could file a last minute habeas petition before sentence was carried out. *E.g., Rogers v. Peck*, 199 U.S. 425 (1905); *Lambert v. Barrett*, 159 U.S. 660 (1895); *In re Shibuya Jugiro*, 140 U.S. 291 (1891). Concerned that condemned state inmates were frustrating the States ability to enforce their capital sentencing laws, in 1908 Con-

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The probable cause requirement of § 2253 may have served its intended purpose for most of this century, but that period is now long passed, for several reasons. Today, repetitive challenges to a prisoner's conviction or sentence have become the norm in capital cases.[21] Some

gress revised the Habeas Corpus Act of 1867 in two ways: It eliminated the automatic right to appeal the denial of a habeas petition to this Court, and it imposed the requirement, now found at 28 U.S.C. § 2253, that a prisoner obtain from this Court a certificate of probable cause to appeal. Act of Mar. 10, 1908, ch. 76, 35 Stat. 40; see H.R. Rep. No. 23, 60th Cong., 1st Sess. 1–2 (1908); 42 Cong. Rec. 608–09 (1908). A certificate of probable cause thus became a jurisdictional prerequisite for appealing to this Court a circuit court's denial of a state prisoner's habeas petition. *House v. Mayo*, 324 U.S. 42, 44 (1945); *Ex parte Patrick*, 212 U.S. 555 (1908); *Bilik v. Strassheim*, 212 U.S. 551 (1908). In 1925, as part of an overall modification of federal appellate jurisdiction, Congress extended the probable cause requirement to the courts of appeals. Act of Feb. 13, 1925, ch. 229, § 6(d), 43 Stat. 940; *see generally Davis v. Jacobs*, 454 U.S. 911, 916–17 (1981) (opinion of Rehnquist, J.); *Jeffries v. Barksdale*, 453 U.S. 914, 915 (1981) (opinion of Rehnquist, J.). In 1948, Congress retained the probable cause requirement in 28 U.S.C. § 2253 as part of an overall modification of the Judicial Code. *See* H.R. Rep. No. 308, 80th Cong., 1st Sess. A179–A80 (1947); Historical and Revision Notes Following 28 U.S.C. § 2253; *Barefoot v. Estelle*, 463 U.S. 880, 892 n.3 (1963); e.g., *Garrison v. Patterson*, 391 U.S. 464 (1968); *Carafas v. LaVallee*, 391 U.S. 234 (1968); *Nowakowski v. Maroney*, 386 U.S. 542 (1967). As this Court explained, the probable cause standard of 28 U.S.C. § 2253 "requires something more than the absence of frivolity" and also is "'a higher one than the "good faith" requirement"' to proceed in forma pauperis under 28 U.S.C. § 1915. *Barefoot*, 463 U.S. at 893 (citation omitted). Instead, "a certificate of probable cause requires a prisoner to make a "substantial showing of the denial of [a] federal right."' *Id.* (citation omitted).

[21] *See, e.g., 1995 Senate Hearing* 7 (statement of Sen. Specter) ("In a context where the delays average 9 years, and in some cases go on as long as 20 years, the death penalty, which should be the flagship of the criminal justice system, has become the laughingstock of the criminal justice system, and criminals get the impression—regrettably, the accurate impression—that the law will not be carried out."); *id.* at 33 (statement of Texas Attorney General Morales); *id.* at 37 (statement of Colorado Attorney General Norton) ("according to the Powell Committee, 40 percent, or almost half of the time, from the imposition of a death sentence to the time of execution is taken up by federal habeas review."); *id.* at 67 (statement of Sen. Thurmond); *1990 Senate*

condemned prisoners, by obtaining judicial review of their claims on dozens of occasions, have been able to delay their execution for more than a decade.[22] That has been the case even in cases involving heinous crimes with no doubt about the prisoner's guilt.[23] Moreover, in capital cases habeas actions often are filed shortly before a prisoner is scheduled to be executed, thereby creating a type of hydraulic pressure on the courts in the hope of staying

Hearings 43 (statement of Hon. Lewis Powell) ("Fairness also requires that if a prisoner's claims are found to be without merit, society is entitled to have a lawful penalty carried out without unreasonable delay."); *id.* at 65 ("The situation we now have with no limit on habeas corpus and none on capital habeas corpus cases, and lawyers being perfectly willing and able to exploit the opportunities they have for this sort of litigation, we have a system that simply is not working."); *id.* at 253 (statement of Hon. Paul Roney) ("There is no finality in death sentence litigation now. The only time anybody gets executed is during a lull in litigation."); *id.* at 283 (same) ("Everybody who has been executed in our circuit has had a second petition."); *id.* at 286 (statement of Sen. Humphrey); *id.* at 345, 346 (statement of Sen. Hatch); *id.* at 724, 725 (statement of Florida Gov. Martinez) ("Florida has had 21 executions since 1979. Those inmates spent an average of 8.3 years on death row, and an average of 10 years passed between the date of their crime and the date the sentence was finally carried out."). The Court's own cases also prove that point. *E.g., Vasquez v. Harris*, 503 U.S. 1000 (1992), and *Gomez v. United States District Court*, 503 U.S. 653 (1992) (fifth action for relief by condemned prisoner); *In re Blodgett*, 502 U.S. 236 (1992) (three habeas petitions by condemned prisoner); *McCleskey v. Bowers*, 501 U.S. 1281 (1991) (third habeas petition by condemned prisoner, filed after *McCleskey v. Zant*, 499 U.S. 467 (1991)); *Delo v. Stokes*, 495 U.S. 320 (1990) (fourth habeas petition by condemned prisoner).

[22] *1995 Senate Hearing* 1–3 (opening statement of Sen. Hatch); *1990 Senate Habeas Hearing* 345 (opening statement of Sen. Hatch). Indeed, some condemned prisoners have been able to delay their execution so long that they actually (and ironically) have claimed—in the teeth of both common sense and precedent, *cf. Rooney v. North Dakota*, 197 U.S. 319, 325 (1905)—that the delay itself prevented their sentence from ever being carried out. *See Lackey v. Collins*, 115 S. Ct. 1421 (1995) (memo. of Stevens, J.).

[23] The case of William Andrews is a good example. The long history of that case is discussed in *Andrews v. Deland*, 943 F.2d 1162 (10th Cir. 1991), *cert. denied*, 502 U.S. 1110 (1992), and *Andrews v. Carver*, 798 F. Supp. 659 (D. Utah 1992).

an execution.[24] Also, claims raised in successive petitions, or at the last minute, are not likely to be meritorious,[25] and may be motivated by nothing more than a desire for delay or improperly to obstruct the State's ability to carry out a lawful sentence.[26]

Congress was not alone in believing that the federal habeas process was in great need of reform in capital cases. The Ad Hoc Committee in Federal Habeas Corpus in Capital Cases, chaired by Retired Justice Lewis Powell, reached the same conclusion. It found that "our present system of multi-layered state and federal appeal and collateral review has led to piecemeal and repetitious litigation, and years of delay between sentencing and a judicial resolution as to whether the sentence was permissible under the law."[27] Not surprisingly, the Committee concluded that "[t]he resulting lack of finality undermines public confidence in our criminal justice system."[28]

[24] This Court has recognized that scenario. "A pattern seems to be developing in capital cases of multiple review in which claims that could have been presented years ago are brought forward—often in a piecemeal fashion—only after the execution date is set or becomes imminent." *Woodard v. Hutchins*, 464 U.S. 377, 380 (1984).

[25] *Powell Committee* 5.

[26] "'It is natural that counsel for the condemned in a capital case should lay hold of every ground which, in their judgment, might tend to the advantage of their client, but the administration of justice ought not to be interfered with on mere pretexts.'" *Barefoot*, 463 U.S. at 888 (quoting *Lambert v. Barrett*, 159 U.S. 660, 662 (1895)); *see also, e.g., 1990 Senate Hearings* 65 (statement of Hon. Lewis Powell); *id.* at 726 (statement of Florida Governor Martinez).

[27] Judicial Conference of the United States, *The Ad Hoc Committee on Federal Habeas Corpus in Capital Cases* 1 (Aug. 29, 1989) (hereinafter *Powell Committee*), reprinted in *Habeas Corpus Reform: Hearings on S. 88, S. 1757, and S. 1760 Before the Senate Comm. on the Judiciary*, 101st Cong., 1st & 2d Sess. 8 (1990) (hereinafter *1990 Senate Habeas Hearing*); *see also id.* ("much of the delay inherent in the present system is not needed for fairness."); *id.* at 10 ("since the Supreme Court's 1972 *Furman* decision only 116 executions have taken place. The shortest of these judicial proceedings required two years and nine months to complete. The longest covered a period of 14 years and six months. The length of the average proceeding was eight years and two months.").

Congress therefore acted rationally to reform the habeas system and to limit prisoners' ability to file second habeas petitions. The systemic costs to federalism of federal review of state court judgments always are great,[29] but those costs are higher still whenever a prisoner seeks relief in a second federal habeas petition.[30] The interests of prisoners and the States both must be considered. Congress is well situated to balance those competing interests and to ensure that the State's interests in the protection of public safety and in finality are given substantial weight in the balance. As Justice Cardozo once noted, "justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934). The Antiterrorism Act is a constitutional and laudable effort to achieve that end.

3. The Act also codifies and strengthens the deference standard adopted in *Teague v. Lane*, 489 U.S. 288 (1989). *Teague* held that federal courts cannot grant relief to a state prisoner by adopting a "new rule" of law when adju-

[28] *Id.*

[29] Federal review of a state court's judgment always is a serious intrusion on the sovereignty of "a coordinate jurisdiction within the federal system," *Sykes*, 433 U.S. at 88, and "entails significant costs," *Engle v. Isaac*, 456 U.S. 107, 126 (1982); *see also, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 260–62 (1973) (Powell, J., concurring); Paul Bator, *Finality in Criminal Law and Federal Habeas Corpus For State Prisoners*, 76 Harv. L. Rev. 441 (1963); Hon. Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970).

[30] *See, e.g., McCleskey v. Zant*, 499 U.S. 467 (1991); *Sawyer v. Whitley*, 505 U.S. 333 (1992). Repeated re-examination of the validity of a state court judgment betrays an unjustified lack of confidence in the ability of state judges to exercise their "primary authority for defining and enforcing the criminal law," *Engle*, 456 U.S. at 128, consistently with their oaths to uphold the Constitution, *McCleskey*, 499 U.S. at 487, while also exhibiting a distressing sense of condescension in the assertedly superior ability of federal judges to enforce federal law.

dicating a habeas corpus petition, and "[a] new rule for *Teague* purposes is one where "the result was not dictated by precedent existing at the time the defendant's conviction became final.'" *Goeke v. Branch,* 115 S. Ct. 1275, 1277 (1995) (quoting *Caspari v. Bohlen,* 114 S. Ct. 948, 953 (1994), quoting in turn *Teague,* 489 U.S. at 301 (plurality opinion) (emphasis deleted in *Goeke*)) *see also, e.g., Graham v Collins,* 113 S. Ct. 892, 897 (1993).[31] Since this Court adopted that standard, the Antiterrorism Act cannot be unconstitutional by incorporating it. To be sure, the Act imposes the additional limitation that only decisions by this Court can satisfy the "clearly established" rule. But this Court has never rejected such an approach to defining the *Teague* standard; its decisions applying *Teague* easily could be read as having endorsed such a standard by implication; and none of this Court's *Teague* decisions suggests that this Court would have acted unconstitutionally if it had adopted such a standard. Under these circumstances, the deference standard in the Antiterrorism Act should be upheld. It cannot be unconstitutional for Congress to adopt by statute a standard

[31] The relevant question under *Teague* is "whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution." *Goeke,* 115 S. Ct. at 1277 (quoting *Caspari v. Bohlen,* 114 S. Ct. at 953, quoting in turn *Saffle v. Parks,* 494 U.S. 484, 488 (1990)); *Gilmore v. Taylor,* 113 S. Ct. 2112, 2116 (1993); *Butler v. McKellar,* 494 U.S. 407, 412 (1990). "The new rule principle validates reasonable, good-faith interpretations of existing precedents made by state courts and thus effectuates the States" interest in the finality of criminal convictions and fosters comity between federal and state courts." *Gilmore,* 113 S. Ct. at 2116 (quoting *Butler,* 494 U.S. at 414; internal punctuation omitted). A claim that government conduct was "arbitrary," "conscience-shocking," or "interferes with fundamental rights'" is insufficient. *Goeke,* 115 S. Ct. at 1277; *see also Gilmore,* 113 S. Ct. at 2118-19. To show that existing precedent "dictated" a ruling in his favor, an inmate must prove that clearly established law left the courts with no alternative except to enter judgment in his favor. *Id.*

that this Court could have endorsed by interpreting prior law.[32]

[32] The Act also does not violate the Eighth Amendment. Neither the text nor the history of the Eighth Amendment contains any limitation on Congress' power to regulate the habeas process. Unlike the Jury Trial Clause of Article III, and the Fifth and Sixth Amendments, which set pretrial and trial procedures for criminal prosecutions, the Eighth Amendment imposes only substantive limitations on the power to confine a suspect before trial or, if he is convicted, to punish him afterwards. The history behind the Eighth Amendment also reveals that this provision was designed to regulate the actual punishments carried out, rather than the procedures by which those penalties were imposed, and certainly not any post-trial procedures by which a conviction or sentence was reviewed. The phrase "cruel and unusual punishments" traces its lineage to the English Bill of Rights of 1689, 1 Wm. & Mary, Sess. 2, ch. 2. While historians disagree over the precise events that triggered the adoption of that provision, they agree that it was directed against unauthorized and perhaps grossly disproportionate penalties. The Cruel and Unusual Punishments Clause of the Eighth Amendment was taken verbatim from that law, in all likelihood, in order to meet complaints voiced in state ratifying conventions that the Constitution did not limit the penalties that Congress could impose. *Harmelin v. Michigan,* 501 U.S. 957, 979-80 (1991) (opinion of Scalia, J.); *Gregg v. Georgia,* 428 U.S. 153, 169-70 n.17 (1976) (lead opinion); Granucci, *"Nor Cruel and Unusual Punishments Inflicted': The Original Meaning,* 57 Calif. L. Rev. 839 (1969). That conclusion is buttressed by the judicial interpretations of the Eighth Amendment and its state counterparts. State courts in the 19th century construed such provisions as prohibiting only certain types of punishment. *See, e.g., Harmelin,* 501 U.S. at 980-81 (opinion of Scalia, J.) (collecting 19th century state court decisions).

To be sure, this Court's decisions have regulated some aspects of the sentencing process that the federal and state governments must follow in order to ensure that the death penalty is not imposed arbitrarily. *E.g., McKoy v. North Carolina,* 494 U.S. 433 (1990); *Godfrey v. Georgia,* 446 U.S. 420 (1980); *Furman v. Georgia,* 408 U.S. 238 (1972). But these decisions regulate only the *trial* procedures to be followed, not *appellate or postconviction* procedures. Indeed, on every occasion on which the claim was advanced, this Court has rejected the argument that the Eighth Amendment requires appellate courts to review capital sentences to ensure that they are not imposed arbitrarily at the trial level. *Lewis v. Jeffers,* 497 U.S. 764, 779-80 (1990); *Walton v. Arizona,* 497 U.S. 639, 654 (1990); *McCleskey v. Kemf, supra; Pulley v. Harris,* 465 U.S. 37, 44-51 (1984); *see Jurek v. Texas,* 428 U.S. 262

Continued

III. This Court Should Not Review Petitioner's Habeas Petition Under 28 U.S.C. §2241

This Court has appellate jurisdiction to review a judgment entered by a circuit court under 28 U.S.C. §1254(1). The last question is whether the Act applies to habeas corpus petitions filed in this Court under 22 U.S.C. §2241 seeking review of a prisoner's conviction.[33] We submit that it does.[34]

(1976) (by implication); Gregg, 428 U.S. at 188-95 (lead opinion) (same). Accordingly, this Court's decisions add nothing to the text or history of the Eighth Amendment, and neither of them reveals any constitutional flaw in the Antiterrorism Act.

[33] In some cases this Court has used writs, such as the writ of habeas corpus, as a means of reviewing lower court judgments. *See generally* Dallin Oaks, *The "Original Writ" of Habeas Corpus in the Supreme Court,* 1962 Sup. Ct. Rev. 153.

[34] As an antecedent matter, it is clear that this Court does not have original jurisdiction over habeas petitions. Under *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803), Congress cannot add to this Court's original jurisdiction in Art. III, §2, Cl. 2, and that provision does not vest this Court with original jurisdiction over cases like this one. The only arguably relevant part of that provision is the reference to "all Cases * * * in which a State shall be party," but that phrase does not aid petitioner. (Originally, Art. III, §2, Cl. 1, also referred to controversies "between a State and Citizens of another State" and "between a state, or the Citizens thereof, and foreign States, Citizens or Subjects." The Eleventh Amendment, however, repealed those jurisdictional grants.) The sentence containing that phrase refers to the jurisdictional grant in Art. III, §2, Cl. 1, and that provision is limited to "Controversies between two or more States." Thus, Congress could not have granted this Court original jurisdiction in §§2241 or 2254. Moreover, this Court made clear in *Ex parte Bollman* that habeas jurisdiction is necessarily "appellate" for Article III purposes, because it contemplates (by definition) that a prior court has entered the judgment under review. 8 U.S. (4 Cranch) at 101 ("It is the revision of a decision of an inferior court, by which a citizen has been committed to jail."). Finally, if there were doubt on this score, the Court should construe §2241 in a manner that ensures its constitutionality. It is a cardinal rule of statutory interpretation that, when doubt arises as to a statute's meaning, Acts of Congress should be construed to be constitutional. *E.g., Public Citizen v. Department of Justice,* 491 U.S. 440 (1989). Here, that canon strongly militates in favor of construing §2241 as discussed above, since otherwise that statute would be unconstitutional under *Marbury v. Madison.*

The Antiterrorism Act clearly sought to channel all second habeas petitions to the circuit courts and just as clearly denied this Court the opportunity to review a circuit court's ruling on such a request, at the behest of the inmate or the State, by certiorari under 28 U.S.C. §1254(1). The Act is materially different from the probable cause provisions of 28 U.S.C. §2253, which allows circuit courts, this Court, or the members of either, to grant a prisoner a certificate of probable cause if the district court has refused to do so. Not only are circuit courts gatekeepers for second habeas petitions, but their decisions on the matter are final. Accordingly, if a circuit court has denied a prisoner the right to file a second petition in district court, it makes no sense to conclude that this Court still may consider a second habeas petition through some means, such as §2241, other than a statutory writ of certiorari under §1254(1). Interpreting §2241 in that manner would nullify the gatekeeper provision of the Antiterrorism Act. For that reason, and since the Act is later-in-time and more specific than §2241, the Court should read the Act as precluding review in this Court of a circuit court's ruling on a second habeas petition under *any* writ. *See, e.g., Robertson,* 503 U.S. at 440 (canon that "specific provisions qualify general ones"); *cf. Carlisle v. United States,* No. 94–9247 (Apr. 29, 1996), slip op. 13.

CONCLUSION

The judgment of the court of appeals should be affirmed, and the petition for a writ of habeas corpus should be denied.

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MAY 17, 1996.

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No. 95-8836

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

ELLIS WAYNE FELKER,
Petitioner

v.

TONY TURPIN, Warden,
Respondent

On Writ of Certiorari to
the United States Court of Appeals for the Eleventh Circuit

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INTEREST OF THE *AMICUS CURIAE*

The National District Attorneys Association is the sole organization representing local prosecuting attorneys across the United States. Since its founding in 1950, the Association's programs of education, training, publication, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all citizens. NDAA members are responsible for the vast majority of criminal prosecutions in this country, and commonly represent the government when convictions are challenged in federal habeas corpus petitions. The Association has longed shared the concern that delayed, repetitive collateral attack on criminal judgments erodes the fundamental notion of finality: that criminal defendants may actually be in jail not because a judge or lawyer made a mistake, but because the criminal is guilty, and should take responsibility for his conduct. NDAA therefore has a compelling interest in the outcome of this case.

This *amicus curiae* brief is filed with the written consent of all parties, in accordance with Supreme Court Rule 37.3(a).

SUMMARY OF ARGUMENT

This case concerns one aspect of the 1996 amendments to the federal habeas corpus statute. Under the new law, a state prisoner wishing to file a second or successive petition must first secure authorization from a panel of court of appeals judges, and may not seek certiorari review in this Court of the panel's decision. That provision, along with other changes to the habeas act, has spawned much academic debate. But the issues raised in this case are readily resolved by integrating the new provisions into the existing statutory structure in

accordance with the plain language of the amendments and the basic rules of statutory construction.

The recent pre-filing limitations on review of second or successive petitions do not conflict with original review of habeas corpus petitions in this Court. The provision establishing these limitations, 28 U.S.C. § 2244(b)(3), states on its face that it applies only as to petitions "filed in the district court." § 2244(b)(3)(A). Thus, a second or successive petitioner seeking to file in the district court must begin by invoking the court of appeals pre-filing authorization procedure, which is not subject to further review. § 2244(b)(3)(E). A second or successive petitioner seeking this Court's review, in contrast, must invoke the original review process established by § 2241(a).

The two avenues of statutory review must, however, be read *in pari materia*, to give the fullest effect to both. Thus, while a second or successive petition may be initiated in either the court of appeals or in this Court, the two processes may not be invoked sequentially. The Congress obviously did not intend that § 2244(b)(3)(E), which precludes appellate or certiorari review of the court of appeals authorization decision, could be entirely circumvented by the simple expedient of filing a § 2241 petition seeking review of the very claims on which the court of appeals has denied authorization to proceed. Instead, the petitioner must elect one path or the other.

And the two processes, while parallel, must operate in a similar fashion. Thus, the same criteria to be applied by the court of appeals in deciding a motion for authorization under § 2244(b)(3) must also be applied if the second petitioner instead chooses to present his filing to this Court as an original matter under § 2241. By the same

token, if the Court chooses to exercise its discretion under § 2241(b) to remand an original petition to a lower court, proceedings thereafter must be subject to the same rules that govern second petitions originating in the lower courts.

With this understanding of the structure of the statute, the questions posed by the grant of certiorari here become fairly narrow: 1) the new provisions do not unconstitutionally limit this Court's jurisdiction, because they do not limit the Court's jurisdiction at all: the Court, under its original matter jurisdiction, may consider the very same legal issues reviewable in the lower courts; 2) the recent amendments — except for § 2244(b)(3), which is specifically limited to district court filings — are fully applicable to petitions filed as original matters under § 2241; and 3) the new statute does not conceivably suspend the writ of habeas corpus in this case, because it does not eliminate review that would otherwise be available.

ARGUMENT

The 1996 habeas corpus amendments provide a method for review of second or successive petitions in either the lower federal courts, under § 2244(b)(3)(E), or in this Court, under § 2241(a). Accordingly, the amendments

1) **accommodate the jurisdictional power of this Court under Article III;**
2) **harmonize with the statutory provisions for the filing of habeas corpus petitions as original matters in this Court; and**
3) **regulate habeas corpus consistently with the Suspension Clause.**

After almost a decade of debate, Congress has recently enacted significant changes to the federal habeas corpus act, through the passage of Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996. This legislation is a response to the concern that continual relitigation of criminal judgments jeopardizes the purposes for having a justice system at all. At some stage, the system must be allowed confidence in its convictions; the victims and perpetrators of crime, and the public at large, must know that a determination of guilt will be taken seriously. Accordingly, the Act embodies the societal determination — forged through unusually lengthy and intensive legislative review — of the appropriate balancing point between reliability and finality.

While the legislation contains many provisions for achieving this balance, only one applies in the present case. Petitioner sought to challenge his state court conviction by filing a second habeas corpus petition after the effective date of the Act. He did not initiate this process under 28

U.S.C. § 2241, which has long given this Court jurisdiction over habeas petitions filed as original matters. Instead, petitioner invoked newly enacted § 2244(b), a gatekeeping mechanism regulating review of such second or successive petitions.

That new provision, by its express language and the manner in which it interacts with § 2241, disposes of the questions raised by the certiorari grant here. Section 2244(b) creates a procedure for review of second or successive petitions in the lower courts, but does not abrogate this Court's power to review petitions filed as original matters under § 2241. Such original petitions, however, may not be used to obviate the requirements of the procedure established under § 2244(b). Thus, the second petitioner may elect either avenue of review — § 2244(b) or § 2241— but not both.

As a result, there is no constitutional or other impediment to implementing the newly amended habeas chapter. The second petition provision, § 2244(b), is not an unlawful infringement on this Court's jurisdiction; while it may slightly alter the form of some habeas litigation in this Court, the provision does not restrict the substance of the review relative to that available in the lower courts. Moreover, the provisions of the 1996 Act are easily incorporated into original matters filed under § 2241, thereby effectuating old and new sections consistently with statutory construction principles. Finally, the new legislation at issue here does not violate the Suspension Clause, as it leaves intact the Court's power of review over issues arising under the Act.

These conclusions follow from examination of the second petition limits contained in § 2244(b). The section

consists of two elements: a set of substantive limitations on the nature of claims cognizable in a second or successive petition filed by a state prisoner, and a set of procedural rules governing the method for litigating such a petition.

The cognizability standards appear in subsection (b)(2). A claim raised in a second or successive petition must be dismissed unless it is based on a new, retroactive constitutional rule, § 2244(b)(2)(A), or on new facts that could not previously have been discovered, and that would have resulted in a not guilty verdict but for constitutional error, § 2244(b)(2)(B).

The procedural rules appear in subsection (b)(3). Under subsection (b)(3)(A), a petitioner seeking to file a second or successive petition must first move for authorization from the court of appeals. Under subsection (b)(3)(B), the motion for authorization must be determined by a three-judge panel rather than a single judge. Under subsection (b)(3)(C), the motion may be granted only upon a prima facie showing that the claims to be presented in the successive petition meet the cognizability standards of subsection (b)(2). Under subsection (b)(3)(E), the panel's determination on this question is not subject to appeal or petition for writ of certiorari in this Court.

There is a distinction between the scope of these two provisions — the cognizability standards and the pre-filing authorization procedure — with significant implications for this case. Subsection (b)(2), concerning the cognizability standards, applies to second or successive petitions without restriction as to the court in which the petition will be litigated. Subsection (b)(3), concerning the pre-filing authorization procedure, in contrast, is a prerequisite only for second or successive petitions that will be "filed in the district court."

Thus, by its own terms, the pre-filing authorization procedure of § 2244(b)(3) does not apply to second or successive petitions to be filed in this Court, as original matters under § 2241. Such original matters are of course not "filed in the district court," and therefore do not require circuit court pre-approval. If they did, the court of appeals would in effect have the power to shut off review under § 2241, because the authorization process is unreviewable by operation of § 2244(b)(3)(E). The new legislation avoids such a barrier by exempting Supreme Court original filings from the authorization process. The Act is therefore compatible, rather than in conflict, with the long-standing provision for original filings in this Court.

At this point, principles of statutory construction operate to regulate further interplay between the new second petition provisions of § 2244 and the original matter provision of § 2241. Amendments to a statute must be read together with the previous, unchanged portions, as if all had been promulgated as one act. The purpose is to avoid conflict and give effect to both old and new provisions. N. Singer, Sutherland on Statutory Construction § 22.34 (5th ed. 1992). Thus, while § 2241 original filings in this Court are not subject to pre-filing authorization by the court of appeals, such original filings cannot be used as a means to avoid the 2244(b)(3) pre-filing procedure once invoked.

That, however, is exactly what petitioner here has attempted. He seeks two bites at the second petition apple — once before the court of appeals panel under the pre-filing procedure, and again before this Court pursuant to certiorari or original matter jurisdiction. If permitted, such a maneuver would obliterate § 2244(b)(3)(E), which explicitly precludes review of the panel's authorization decision. The only way to give meaningful effect to all

provisions is to put the petitioner to a choice. He may move for authorization before the panel or petition as an original matter before this Court, but not both.

In other respects, the two processes can easily be conformed. Although not explicitly incorporated into § 2241, the cognizability standards of § 2244(b)(2) are — unlike (b)(3) — not limited to petitions to be filed in the district court. Thus, all second petitions, whether initiated by a motion for authorization in the court of appeals or by an original filing in this Court, must be judged against those standards.[1]

If the petitioner chooses this Court's review, the Court may still exercise discretion under § 2241(b) to remand the petition to the district court rather than engage in merits review. Nothing in the new legislation circumscribes this discretion.[2] Once the case is remanded, however, it must be treated like other district court filings, subject to any applicable requirements, such as the pre-filing authorization procedure of § 2244(b)(3).

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[1] The importation of such requirements into § 2241 original petition practice is not a new development in habeas corpus law. The Court has specifically directed that petitions filed as original matters under § 2241 must meet the exhaustion doctrine of § 2254(b). Supreme Court Rule 20.4(a). Presumably, the Court would also apply other doctrines, developed through case law — e.g., abuse of the writ, McCleskey v. Zant, 499 U.S. 467 (1991), and procedural default, Coleman v. Thompson, 501 U.S. 722 (1991) — to § 2241 original petitions.

[2] There is one respect in which the 1996 Act arguably has an impact on § 2241(b). Section 103 of the Act amends Fed. R. App. P. 22(a) to require a court of appeals judge to transfer to a district judge any habeas petition filed as an original matter in the court of appeals. This provision, however, affects § 2241(b) discretion only for the court of appeals, not for this Court.

The net result of this integration of the new provisions with the old is that the habeas petitioner may, as in the past, initiate the review process in either the lower courts or in this Court. If he wishes to begin in the district court, he must first seek authorization in the court of appeals, from which no higher review will lie. If he wishes to begin in this Court, no pre-filing authorization is required, but he will be face the same cognizability standards as in the court of appeals, and the possibility of a remand.

With the new statutory framework established, the questions posed in the grant of certiorari are readily resolved.

The amendments at issue do not restrict the Court's jurisdiction in violation of Article III of the Constitution. No such restriction exists for the initiation of review of a second or successive petition. The petitioner may always invoke this Court's jurisdiction simply by electing to proceed with an original matter under § 2241 rather than a motion for circuit court authorization under § 2244(b)(3). The Court's original matter jurisdiction is discretionary review of the same nature as certiorari jurisdiction. Whether or not the Court chooses to address the merits, it retains the ability to examine § 2241 filings for important and recurrent issues. The fact that this review carries a different label (original matter rather than certiorari) or occurs at a different juncture (in place of rather than after court of appeals consideration) does not change the jurisdictional result. Thus, because the statute preserves the opportunity for this Court's review, there is no jurisdiction-limiting issue to resolve.

The recent amendments must apply to habeas petitions filed as original matters in this Court under §

2241. As discussed, new § 2244(b) can successfully be harmonized with § 2241.[3] As a matter of statutory construction, the broad language of § 2241 cannot be read as a means of escaping specific limitations provided elsewhere in the habeas corpus chapter.

The 1996 Act does not constitute a suspension of the writ of habeas corpus in this case. Any such contention would be a makeweight. This Court remains available under § 2241 to review any contention that claims meet the cognizability standards for second or successive petitions. See Swain v. Pressley, 430 U.S. 372 (1977) (substitution of remedies is not suspension of habeas writ). The only reason such a course is no longer open to petitioner here is that he instead elected a procedure, under § 2244(b), that on its face precludes review of the court of appeals authorization decision. The writ of habeas corpus cannot be considered suspended merely because the petitioner chose one litigation strategy over another, and now wishes to have it both ways.[4]

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[3] The same principles guiding that process also apply to other sections of the new statute not at issue in this case. The 1996 Act, for example, creates § 2244(d), which establishes time limits for the filing of a federal habeas petition following the completion of state court review. The filing deadline is not limited to district court filings, and would be rendered ineffective if not applied to petitions filed as original matters in this Court under § 2241.

[4] Of course, even a genuine suspension of review previously available under the habeas corpus statutes would not violate the Suspension Clause of Article I, § 9. The habeas statutes are not the embodiment of the writ referred to in the Constitution, Swain v. Pressley, 430 U.S. 372 (1977) (Burger, C.J., concurring); rather, they were promulgated under the authority of § 5 of the Fourteenth Amendment, to create a new remedy in the law for the protection of civil rights. The vicissitudes of statutory habeas review are not the equivalent of suspension under the Constitution.

Accordingly, the statutory scheme is valid and must be applied to petitioner's case. His certiorari petition contravenes § 2244(b)(3)(E), and so the grant of certiorari must be vacated. His habeas petition as an original matter, filed as it was following court of appeals review under § 2244(b)(3), is in derogation of § 2244(b)(3)(E), and so must be denied. Because no proceeding is properly before the Court, the stay of execution must be lifted.

CONCLUSION

For these reasons, the Court should vacate the grant of the writ of certiorari, deny the petition for a writ of habeas corpus, and vacate the stay of execution.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 95–8836

ELLIS WAYNE FELKER, PETITIONER *v.*
TONY TURPIN, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND ON PETITION FOR A WRIT OF HABEAS CORPUS

[June 28, 1996]

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Title I of the Antiterrorism and Effective Death Penalty Act of 1996 (Act) works substantial changes to chapter 153 of Title 28 of the United States Code, which authorizes federal courts to grant the writ of habeas corpus. Pub. L. 104–132, 110 Stat. 1217. We hold that the Act does not preclude this Court from entertaining an application for habeas corpus relief, although it does affect the standards governing the granting of such relief. We also conclude that the availability of such relief in this Court obviates any claim by petitioner under the Exceptions Clause of Article III, §2, of the Constitution, and that the operative provisions of the Act do not violate the Suspension Clause of the Constitution, Art. I, §9.

I

On a night in 1976, petitioner approached Jane W. in his car as she got out of hers. Claiming to be lost and looking for a party nearby, he used a series of deceptions to induce Jane to accompany him to his trailer home in town. Petitioner forcibly subdued her, raped her, and sodomized her. Jane pleaded with petitioner to

let her go, but he said he could not because she would notify the police. She escaped later, when petitioner fell asleep. Jane notified the police, and petitioner was eventually convicted of aggravated sodomy and sentenced to 12 years' imprisonment.

Petitioner was paroled four years later. On November 23, 1981, he met Joy Ludlam, a cocktail waitress, at the lounge where she worked. She was interested in changing jobs, and petitioner used a series of deceptions involving offering her a job at "The Leather Shoppe," a business he owned, to induce her to visit him the next day. The last time Joy was seen alive was the evening of the next day. Her dead body was discovered two weeks later in a creek. Forensic analysis established that she had been beaten, raped, and sodomized, and that she had been strangled to death before being left in the creek. Investigators discovered hair resembling petitioner's on Joy's body and clothes, hair resembling Joy's in petitioner's bedroom, and clothing fibers like those in Joy's coat in the hatchback of petitioner's car. One of petitioner's neighbors reported seeing Joy's car at petitioner's house the day she disappeared.

A jury convicted petitioner of murder, rape, aggravated sodomy, and false imprisonment. Petitioner was sentenced to death on the murder charge. The Georgia Supreme Court affirmed petitioner's conviction and death sentence, *Felker* v. *State*, 252 Ga. 351, 314 S. E. 2d 621, and we denied certiorari, 469 U. S. 873 (1984). A state trial court denied collateral relief, the Georgia Supreme Court declined to issue a certificate of probable cause to appeal the denial, and we again denied certiorari. *Felker* v. *Zant*, 502 U. S. 1064 (1992).

Petitioner then filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Georgia, alleging that (1) the State's evidence was insufficient to convict him; (2) the State withheld exculpatory evidence, in violation of *Brady* v. *Maryland*, 373 U. S. 83 (1963); (3) petitioner's counsel rendered ineffective assistance at sentencing; (4) the State improperly used hypnosis to refresh a witness' memory; and (5) the State violated double jeopardy and collateral estoppel principles by using petitioner's crime against Jane W. as evidence at petitioner's trial for crimes against Joy Ludlam. The District Court denied the petition. The United States Court of Appeals for the Eleventh Circuit affirmed, 52 F. 3d 907, extended on denial of petition for rehearing, 62 F. 3d 342 (1995), and we denied certiorari, 516 U. S. ___ (1996).

The State scheduled petitioner's execution for the period May 2–9, 1996. On April 29, 1996, petitioner filed a second petition for state collateral relief. The state trial court denied this petition May 1, and the Georgia Supreme Court denied certiorari May 2.

On April 24, 1996, the President signed the Act into law. Title I of this Act contained a series of amendments to existing federal habeas corpus law. The provisions of the Act pertinent to this case concern second or successive habeas corpus applications by state prisoners. Subsections 106(b)(1) and (b)(2) specify the conditions under which claims in second or successive applications must be dismissed, amending 28 U. S. C. §2244(b) to read:

> "(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> "(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> "(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

"(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

"(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 110 Stat. 1220–1221.

Subsection 106(b)(3) creates a "gatekeeping" mechanism for the consideration of second or successive applications in district court. The prospective applicant must file in the court of appeals a motion for leave to file a second or successive habeas application in the district court. §106(b)(3)(A). A three-judge panel has 30 days to determine whether "the application makes a prima facie showing that the application satisfies the requirements of" §106(b). §106(b)(3)(C); see §§106(b)(3)(B), (D). Section 106(b)(3)(E) specifies that "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari."

On May 2, 1996, petitioner filed in the United States Court of Appeals for the Eleventh Circuit a motion for stay of execution and a motion for leave to file a second or successive federal habeas corpus petition under §2254. Petitioner sought to raise two claims in his second petition, the first being that the state trial court violated due process by equating guilt "beyond a reasonable doubt" with "moral certainty" of guilt in voir dire and jury instructions. See *Cage* v. *Louisiana*, 498 U. S. 39 (1990). He also alleged that qualified experts, reviewing the forensic evidence after his conviction, had established that Joy must have died during a period when petitioner was under police surveillance for Joy's disappearance and thus had a valid alibi. He claimed that the testimony of the State's forensic expert at trial was suspect because he is not a licensed physician, and that the new expert testimony so discredited the State's testimony at trial that petitioner had a colorable claim of factual innocence.

The Court of Appeals denied both motions the day they were filed, concluding that petitioner's claims had not been presented in his first habeas petition, that they did not meet the standards of §106(b)(2) of the Act, and that they would not have satisfied pre-Act standards for obtaining review on the merits of second or successive claims. 83 F. 3d 1303 (CA11 1996). Petitioner filed in this Court a pleading styled a "Petition for Writ of Habeas Corpus, for Appellate or Certiorari Review of the Decision of the United States Circuit Court for the Eleventh Circuit, and for Stay of Execution." On May 3, we granted petitioner's stay application and petition for certiorari. We ordered briefing on the extent to which the provisions of Title I of the Act apply to a petition for habeas corpus filed in this Court, whether application of the Act suspended the writ of habeas corpus in this case, and whether Title I of the Act, especially §106(b)(3)(E), constitutes an unconstitutional restriction on the jurisdiction of this Court. 517 U. S. ___ (1996).

II

We first consider to what extent the provisions of Title I of the Act apply to petitions for habeas corpus filed as original matters in this Court pursuant to 28 U. S. C. §§2241 and 2254. We conclude that although the Act does impose new conditions on our authority to grant relief, it does not deprive this Court of jurisdiction to entertain original habeas petitions.

A

Section 106(b)(3)(E) of the Act prevents this Court from reviewing a court of appeals order denying leave to file a second habeas petition by appeal or by writ of certiorari. More than a century ago, we considered whether a statute barring review by appeal of the judgment of a circuit court in a habeas case also deprived this Court of power to entertain an original habeas petition. *Ex parte Yerger,* 8 Wall. 85 (1869). We consider the same question here with respect to §106(b)(3)(E).

Yerger's holding is best understood in the light of the availability of habeas corpus review at that time. Section 14 of the Judiciary Act of 1789 authorized all federal courts, including this Court, to grant the writ of habeas corpus, when prisoners were "in custody, under or by colour of the authority of the United States, or [were] committed for trial before some court of the same." Act of Sept. 24, 1789, ch. 20, §14, 1 Stat. 82.[1] Congress greatly expanded the scope of federal habeas corpus in 1867, authorizing federal courts to grant the writ, "in addition to the authority already conferred by law," "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." Act of Feb. 5, 1867, ch. 28, 14 Stat. 385.[2] Before the Act of 1867, the only instances in which a federal court could issue the writ to produce a state prisoner were if the prisoner

[1]Section 14 is the direct ancestor of 28 U. S. C. §2241, subsection (a) of which now states in pertinent part: "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions."

[2]This language from the 1867 Act is the direct ancestor of §2241(c)(3), which states: "The writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States."

was "necessary to be brought into court to testify," Act of Sept. 24, 1789, ch. 20, §14, 1 Stat. 82, was "committed . . . for any act done . . . in pursuance of a law of the United States," Act of Mar. 2, 1833, ch. 57, §7, 4 Stat. 634–635, or was a "subjec[t] or citize[n] of a foreign State, and domiciled therein," and held under state law, Act of Aug. 29, 1842, ch. 257, 5 Stat. 539–540.

The Act of 1867 also expanded our statutory appellate jurisdiction to authorize appeals to this Court from the final decision of any circuit court on a habeas petition. 14 Stat. 386. This enactment changed the result of *Barry* v. *Mercein,* 5 How. 103 (1847), in which we had held that the Judiciary Act of 1789 did not authorize this Court to conduct appellate review of circuit court habeas decisions. However, in 1868, Congress revoked the appellate jurisdiction it had given in 1867, repealing "so much of the [Act of 1867] as authorizes an appeal from the judgment of the circuit court to the Supreme Court of the United States." Act of Mar. 27, 1868, ch. 34, §2, 15 Stat. 44.

In *Yerger,* we considered whether the Act of 1868 deprived us not only of power to hear an appeal from a inferior court's decision on a habeas petition, but also of power to entertain a habeas petition to this Court under §14 of the Act of 1789. We concluded that the 1868 Act did not affect our power to entertain such habeas petitions. We explained that the 1868 Act's text addressed only jurisdiction over appeals conferred under the Act of 1867, not habeas jurisdiction conferred under the Acts of 1789 and 1867. We rejected the suggestion that the Act of 1867 had repealed our habeas power by implication. *Yerger,* 8 Wall., at 105. Repeals by implication are not favored, we said, and the continued exercise of original habeas jurisdiction was not "repugnant" to a prohibition on review by appeal of circuit court habeas judgments. *Ibid.*

Turning to the present case, we conclude that Title I of the Act has not repealed our authority to entertain original habeas petitions, for reasons similar to those stated in *Yerger*. No provision of Title I mentions our authority to entertain original habeas petitions; in contrast, §103 amends the Federal Rules of Appellate Procedure to bar consideration of original habeas petitions in the courts of appeals.[3] Although §106(b)(3)(E) precludes us from reviewing, by appeal or petition for certiorari, a judgment on an application for leave to file a second habeas petition in district court, it makes no mention of our authority to hear habeas petitions filed as original matters in this Court. As we declined to find a repeal of §14 of the Judiciary Act of 1789 as applied to this Court by implication then, we decline to find a similar repeal of §2241 of Title 28—its descendant, n. 1, *supra*—by implication now.

This conclusion obviates one of the constitutional challenges raised. The critical language of Article III, §2, of the Constitution provides that, apart from several classes of cases specifically enumerated in this Court's original jurisdiction, "[i]n all the other Cases . . . the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." Previous decisions construing this clause have said that while our appellate powers "are given by the constitution," "they

[3]Section 103 of the Act amends Federal Rule of Appellate Procedure 22(a) to read: "An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application shall be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge shall not be permitted. The applicant may, pursuant to section 2253 of title 28, United States Code, appeal to the appropriate court of appeals from the order of the district court denying the writ."

are limited and regulated by the [Judiciary Act of 1789], and by such other acts as have been passed on the subject." *Durousseau* v. *United States*, 6 Cranch 307, 314 (1810); see also *United States* v. *More*, 3 Cranch 159, 172–173 (1805). The Act does remove our authority to entertain an appeal or a petition for a writ of certiorari to review a decision of a court of appeals exercising its "gatekeeping" function over a second petition. But since it does not repeal our authority to entertain a petition for habeas corpus, there can be no plausible argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, §2.

B

We consider next how Title I affects the requirements a state prisoner must satisfy to show he is entitled to a writ of habeas corpus from this Court. Title I of the Act has changed the standards governing our consideration of habeas petitions by imposing new requirements for the granting of relief to state prisoners. Our authority to grant habeas relief to state prisoners is limited by §2254, which specifies the conditions under which such relief may be granted to "a person in custody pursuant to the judgment of a State court."[4] §2254(a). Several

[4]As originally enacted in 1948, 28 U. S. C. §2254 specified that "[a]n application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State." 28 U. S. C. §2254 (1946 ed., Supp. III). The reviser's notes, citing *Ex parte Hawk*, 321 U. S. 114 (1944), indicated that "[t]his new section is declaratory of existing law as affirmed by the Supreme Court." Reviser's Note following 28 U. S. C. §2254, p. 1109 (1946 ed., Supp. III). *Hawk* was one of a series of opinions in which we applied the exhaustion requirement first announced in *Ex parte Royall*, 117 U. S. 241 (1886), to deny relief to applicants seeking writs of habeas corpus from this Court.

sections of the Act impose new requirements for the granting of relief under this section, and they therefore inform our authority to grant such relief as well.

Section 106(b) of the Act addresses second or successive habeas petitions. Section 106(b)(3)'s "gatekeeping" system for second petitions does not apply to our consideration of habeas petitions because it applies to applications "filed in the district court." §106(b)(3)(A). There is no such limitation, however, on the restrictions on repetitive and new claims imposed by subsections 106(b)(1) and (2). These restrictions apply without qualification to any "second or successive habeas corpus application under section 2254." §§106(b)(1), (2). Whether or not we are bound by these restrictions, they certainly inform our consideration of original habeas petitions.

III

Next, we consider whether the Act suspends the writ of habeas corpus in violation of Article I, §9, clause 2, of the Constitution. This clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

The writ of habeas corpus known to the Framers was quite different from that which exists today. As we explained previously, the first Congress made the writ of habeas corpus available only to prisoners confined under the authority of the United States, not under state authority. *Supra*, at 6–7; see *Ex parte Dorr*, 3 How. 103 (1844). The class of judicial actions reviewable by the writ was more restricted as well. In *Ex parte Watkins*, 3 Pet. 193 (1830), we denied a petition for a writ of habeas corpus from a prisoner "detained in prison by virtue of the judgment of a court, which court possesses general and final jurisdiction in criminal cases." *Id.*, at 202. Reviewing the English common law

which informed American courts' understanding of the scope of the writ, we held that "[t]he judgment of the circuit court in a criminal case is of itself evidence of its own legality," and that we could not "usurp that power by the instrumentality of the writ of habeas corpus." *Id.*, at 207.

It was not until 1867 that Congress made the writ generally available in "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." *Supra*, at 6. And it was not until well into this century that this Court interpreted that provision to allow a final judgment of conviction in a state court to be collaterally attacked on habeas. See, *e.g.*, *Waley* v. *Johnston*, 316 U. S. 101 (1942); *Brown* v. *Allen*, 344 U. S. 443 (1953). But we assume, for purposes of decision here, that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789. See *Swain* v. *Pressley*, 430 U. S. 372 (1977); *id.*, at 385 (Burger, C. J., concurring).

The Act requires a habeas petitioner to obtain leave from the court of appeals before filing a second habeas petition in the district court. But this requirement simply transfers from the district court to the court of appeals a screening function which would previously have been performed by the district court as required by 28 U. S. C. §2254 Rule 9(b). The Act also codifies some of the pre-existing limits on successive petitions, and further restricts the availability of relief to habeas petitioners. But we have long recognized that "the power to award the writ by any of the courts of the United States, must be given by written law," *Ex parte Bollman*, 4 Cranch 75, 94 (1807), and we have likewise recognized that judgments about the proper scope of the writ are "normally for Congress to make." *Lonchar* v. *Thomas*, 517 U. S. ___, ___ (slip op., at 8).

The new restrictions on successive petitions constitute

a modified res judicata rule, a restraint on what is called in habeas corpus practice "abuse of the writ." In *McCleskey* v. *Zant*, 499 U. S. 467 (1991), we said that "the doctrine of abuse of the writ refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions." *Id.*, at 489. The added restrictions which the Act places on second habeas petitions are well within the compass of this evolutionary process, and we hold that they do not amount to a "suspension" of the writ contrary to Article I, §9.

IV

We have answered the questions presented by the petition for certiorari in this case, and we now dispose of the petition for an original writ of habeas corpus. Our Rule 20.4(a) delineates the standards under which we grant such writs:

> "A petition seeking the issuance of a writ of habeas corpus shall comply with the requirements of 28 U. S. C. §§2241 and 2242, and in particular with the provision in the last paragraph of §2242 requiring a statement of the 'reasons for not making application to the district court of the district in which the applicant is held.' If the relief sought is from the judgment of a state court, the petition shall set forth specifically how and wherein the petitioner has exhausted available remedies in the state courts or otherwise comes within the provisions of 28 U. S. C. §2254(b). To justify the granting of a writ of habeas corpus, the petitioner must show exceptional circumstances warranting the exercise of the Court's discretionary powers and must show that adequate relief cannot be obtained in any other form or from any other court. These writs are rarely granted."

Reviewing petitioner's claims here, they do not

materially differ from numerous other claims made by successive habeas petitioners which we have had occasion to review on stay applications to this Court. Neither of them satisfies the requirements of the relevant provisions of the Act, let alone the requirement that there be "exceptional circumstances" justifying the issuance of the writ.

* * *

The petition for writ of certiorari is dismissed for want of jurisdiction. The petition for an original writ of habeas corpus is denied.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 95–8836

ELLIS WAYNE FELKER, PETITIONER *v.*
TONY TURPIN, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND ON PETITION FOR A WRIT OF HABEAS CORPUS

[June 28, 1996]

JUSTICE STEVENS, with whom JUSTICE SOUTER and JUSTICE BREYER join, concurring.

While I join the Court's opinion, I believe its response to the argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, §2, is incomplete. I therefore add this brief comment.

As the Court correctly concludes, the Act does not divest this Court of jurisdiction to grant petitioner relief by issuing a writ of habeas corpus. It does, however, except the category of orders entered by the courts of appeals pursuant to §106(b)(3) from this Court's statutory jurisdiction to review cases in the courts of appeals pursuant to 28 U. S. C. §1254(1). The Act does not purport to limit our jurisdiction under that section to review interlocutory orders in such cases, to limit our jurisdiction under §1254(2), or to limit our jurisdiction under the All Writs Act, 28 U. S. C. §1651.

Accordingly, there are at least three reasons for rejecting petitioner's argument that the limited exception violates Article III, §2. First, if we retain jurisdiction to review the gatekeeping orders pursuant to the All Writs Act—and petitioner has not suggested otherwise—such orders are not immune from direct review. Second, by entering an appropriate interlocutory order, a court of

appeals may provide this Court with an opportunity to review its proposed disposition of a motion for leave to file a second or successive habeas application. Third, in the exercise of our habeas corpus jurisdiction, we may consider earlier gatekeeping orders entered by the court of appeals to inform our judgments and provide the parties with the functional equivalent of direct review. In this case the Court correctly denies the writ of habeas corpus because petitioner's claims do not satisfy the requirements of our pre-Act jurisprudence or the requirements of the Act, including the standards governing the court of appeals' gatekeeping function.

SUPREME COURT OF THE UNITED STATES

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[June 28, 1996]

JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE BREYER join, concurring.

I join the Court's opinion. The Court holds today that the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1217, precludes our review, by "certiorari" or by "appeal," over the Courts of Appeals's "gatekeeper" determinations. See provision to be codified at 28 U. S. C. §2244(b)(3)(E). The statute's text does not necessarily foreclose all of our appellate jurisdiction, see, *e.g.*, 28 U. S. C. §§1254(2) (certified questions from courts of appeals); §1651(a) (authority to issue appropriate writs in aid of another exercise of appellate jurisdiction); this Court's Rule 20.3 (procedure for petitions for extraordinary writs), nor has Congress repealed our authority to entertain original petitions for writs of habeas corpus.[1] Because petitioner sought only a writ of certiorari (which Congress has foreclosed) and a writ of habeas corpus (which, even applying the

[1]Such a petition is commonly understood to be "original" in the sense of being filed in the first instance in this Court, but nonetheless for constitutional purposes an exercise of this Court's appellate (rather than original) jurisdiction. See Oaks, The "Original" Writ of Habeas Corpus in the Supreme Court, 1962 S. Ct. Rev. 153.

traditional criteria, we would choose to deny, see *ante*, at 12), I have no difficulty with the conclusion that the statute is not on its face, or as applied here, unconstitutional. I write only to add that if it should later turn out that statutory avenues other than certiorari for reviewing a gatekeeping determination were closed, the question whether the statute exceeded Congress's Exceptions Clause power would be open.[2] The question could arise if the Courts of Appeals adopted divergent interpretations of the gatekeeper standard.

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[2]See *e.g.*, Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1364–1365 (1953) (articulating "essential functions" limitation on the Exceptions Clause); Ratner, Congressional Power Over the Appellate Jurisdiction of the Supreme Court, 109 U. Pa. L. Rev. 157, 160–167 (1960) (same); Gunther, Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate, 36 Stan. L. Rev. 895, 896–899 (1984) (taking a broad view of Congress's authority, but noting ongoing scholarly debate); Caminker, Why Must Inferior Courts Obey Superior Court Precedents?, 46 Stan. L. Rev. 781, 828–837 (1994) (noting that the "essential functions" argument may find textual support, with respect to the lower federal courts, in the requirement of Art. I, §8, cl. 9, that such courts be "inferior to the supreme Court").